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No. _____

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TELEDYNE, INC.,

Petitioner,

—v.—

MARJORIE DATSKOW, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
DISTRICT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether, contrary to the decisions of the Court, a Court of Appeals may substitute its own finding of waiver of invalid service of process and reverse the District Court, which determined upon the circumstances before it that a finding of waiver was "wholly without merit", where there was no determination by the Court of Appeals that the District Court's finding was clearly erroneous, an abuse of discretion, or erroneous as a matter of law?

2. Whether a defense of invalid service of process, timely asserted in a responsive pleading pursuant to Federal Rule 12(b) and (h), was waived by the failure of defendant's counsel, at a scheduling conference three weeks after the defense was interposed, to remind plaintiffs' counsel of the defense and, contrary to the Code of Professional Responsibility and defendant's counsel's duty of fidelity to his client, advise his adversary about the defect in the manner of service so as to enable his adversary to attempt to serve properly his client before the time for service expired and before plaintiff's wrongful death claims were barred by the statute of limitations?

3. Whether the Court of Appeals may set aside and reverse the order of the District Court denying plaintiffs' motion under Rule 15(a) and (c) to amend the complaint to add a defendant without a determination that the District Court abused its discretion?

4. Whether, in a diversity case, under Federal Rule 15(c) as construed by the Court in *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986), notice to the party to be brought in, within the period of service permitted by state law but after the limitations period would have otherwise expired, permits amendment to the complaint and relation back to the time of the filing of the complaint as to the party to be brought in?

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Second Circuit: Marjorie Datskow, a Pennsylvania citizen, individually and as executrix of the estates of Robert C. Gross and Susan C. Gross, and as administratrix of the estates of Michael and David Gross, minors; Grossair, Inc., averred to be a New York corporation (appellants); and Teledyne, Inc. (appellee).

Teledyne, Inc. is a Delaware corporation. Teledyne Industries, Inc., a California corporation which did not appear in the action below, is a wholly owned subsidiary of Teledyne, Inc.

Teledyne, Inc. has the following nonwholly owned subsidiaries: Teledyne Canada, Limited; Teledyne Exploration Ltd.; Teledyne Gesellschaft mit beschränkter Haftung; Powertronic Systems, Inc.; Western Mining Technology, Inc.; Wolfram Bergbau und Hüttengesellschaft m.b.H.

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PETITION FOR WRIT OF CERTIORARI

Opinions Below

The final (per curiam) opinion of the United States Court of Appeals for the Second Circuit, on petition for rehearing, appears in the appendix to this petition (App. pp. 1a-3a), as well as the initial opinion of the Court of Appeals (per Jon O. Newman, J.). (App. 4a-16a). Also appearing in the appendix is the decision and order of the United States District Court for the Western District of New York (David C. Larimer, D.J.) granting petitioner's motion to dismiss on grounds of lack of personal jurisdiction, lack of proper service, and the statute of limitations (App. 17a-31a), and the decision and order of the District Court denying respondents' motion for reconsideration. (App. 32a-34a).

The initial opinion of the Court of Appeals is reported at 899 F.2d 1298 (2d Cir. 1990). The final opinion of the Court of Appeals on rehearing has been unofficially reported at 1990 U.S. App. LEXIS 4535 (2d Cir. May 2, 1990). Neither of the decisions and orders of the District Court has been reported.

Jurisdiction

On May 2, 1990, the United States Court of Appeals for the Second Circuit denied petitioner's petition for rehearing of its March 23, 1990 judgment. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (1986).

Rules Involved

The rules involved in the case, Rules 12(b), 12(h), 15(a) and 15(c) of the Federal Rules of Civil Procedure, appear in the appendix to this petition. (App. 59a-60a).

Statement of the Case

On November 26, 1986, a Beechcraft single-engine aircraft crashed on approach to the airport at Winston-Salem, North Carolina, killing respondent Datskow's decedents, Robert and Susan Gross and their sons. On November 22, 1988, shortly before the expiration of the statute of limitations, respondents Datskow and Grossair, Inc., the owner of the aircraft, filed a summons and complaint in the United States District Court for the Western District of New York. Jurisdiction was based upon diversity of citizenship.¹ The com-

¹ Plaintiff Datskow was a Pennsylvania citizen and plaintiff Grossair, Inc. was alleged to be a citizen of New York. Defendant Teledyne, Inc. was a Delaware corporation whose principal place of business was neither in New York nor Pennsylvania. Teledyne Industries, Inc., the party respondents sought to bring into the action, was a California corporation whose principal place of business was neither in New York nor Pennsylvania. Sup. Ct. Rule 14.1(i).

plaint sought damages for products liability in the manufacture of the aircraft engine which allegedly failed.

Respondents named as the defendant "TELEDYNE, INC., Continental Motors Division." (App 35a, 37a). Respondents described the named defendant in the body of the Complaint as "Teledyne, Inc." and correctly identified "Teledyne, Inc." as a Delaware corporation (App. 38a), a corporation different from Teledyne Industries, Inc., its wholly-owned subsidiary, which is a California corporation. (App. 19a).

On December 5, 1988, after the New York statute of limitations would have run on respondent Datskow's wrongful death claims, but within the 60-day period provided by New York law for service of process, N.Y. Civ. Prac. L. & R. § 203(b)(5) (McKinney Supp. 1990) (hereinafter CPLR § 203(b)(5)), extraterritorial service of the summons and complaint by mail was attempted upon the Teledyne Continental Motors Aircraft Products Division of Teledyne Industries, Inc. in Alabama, which had manufactured the engine installed on the accident aircraft.

The named defendant, Teledyne, Inc., timely answered the complaint on December 23, 1988 and asserted in its answer as defenses lack of personal jurisdiction, improper service of process and the statute of limitations. Teledyne Industries, Inc. did not answer the complaint or otherwise appear in the action.

At the initial magistrate's scheduling conference held on January 17, 1989, eight days before the 60-day period for service under New York law would expire, respondents' and Teledyne, Inc.'s counsel agreed to a scheduling order which, *inter alia*, established a discovery schedule and required all Rule 12 motions to be filed by August 31, 1989. (App. 56a-58a).

At that conference, neither respondents' counsel nor Teledyne, Inc.'s counsel said anything about the jurisdictional defense of insufficient service of process raised in Teledyne, Inc.'s answer, nor was there any discussion before the magis-

trate about the efficacy of the extraterritorial service by mail. Teledyne, Inc. complied with this scheduling order by filing its motion on April 21, 1989 to dismiss the action on grounds of lack of personal jurisdiction and invalid service of process, and on the ground that the statute of limitations barred the claims for wrongful death.

In the wake of Teledyne, Inc.'s motion to dismiss, respondents on May 22, 1989 moved to amend the complaint to substitute as the defendant "Teledyne Continental Motors Aircraft Products Division of Teledyne Industries, Inc." This was the precise name of the company contained in pleadings in another earlier action involving respondent's counsel, as well as in four releases which counsel executed a few months before filing the present action, in connection with another legal proceeding against Teledyne Industries, Inc. and the same division.

The District Court dismissed the action against Teledyne, Inc. for lack of personal jurisdiction and insufficient service of process, and held the wrongful death claims time-barred. The District Court also denied respondents' motion to amend for failure to satisfy the criteria of Rule 15(c) for relation back under *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986), (App. 28a-30a), and denied respondents' motion for reconsideration. (App. 32a-35a). Respondents have since filed a second action against both Teledyne, Inc. and Teledyne Industries, Inc. on respondents' remaining claims for survival, strict liability, fraud and breach of warranty.

Reversing the decision of the District Court, the Second Circuit Court of Appeals did not address Rule 15, but characterized respondents' motion to amend as a "motion to redesignate". The Court of Appeals held that "plaintiffs did not select the wrong defendant but committed the lesser sin of mislabeling the right defendant", Teledyne Industries, Inc. (App. 8a). The Second Circuit further found that Teledyne Industries, Inc. was doing business in New York, and was amenable to personal jurisdiction. With regard to the service of process issue, the Court of Appeals upheld the District

Court's ruling that respondents' extraterritorial mail service was ineffective, stating respondents had "no basis for believing that the adoption of mail service in 1983 was intended to permit disregard of Rule 4(f)." (App. 11a).

The Court of Appeals found, however, "under all the circumstances", that this defective service of process was waived for purposes of Rule 12 by *Teledyne Industries, Inc.*, through Teledyne, Inc.'s appearance at the initial scheduling conference. (App. 12a). Addressing whether the wrongful death claims were time-barred, the Second Circuit ruled that waiver of defective service for purposes of Rule 12 also constituted waiver of the service requirement under state law for obtaining the 60-day extension under CPLR § 203(b)(5), (App. 15a), thereby rendering respondent's wrongful death claims timely for purposes of the statute of limitations. The Second Circuit simply concluded: "The same circumstances that sufficed to constitute a waiver of service for purposes of personal jurisdiction also waive service for purposes of strict compliance with section 203(b)(5)." (App. 15a).²

On petition for rehearing, the Second Circuit modified its original opinion to recognize that Rule 15(c) applied to this case even if characterized as involving a 'misabeled' defendant. (App. 1a-3a). Applying Rule 15(c), the Court of Appeals ruled that the 60-day period for effecting service of process under CPLR § 203(b)(5) extended the two-year wrongful death limitation period for purposes of the Rule 15(c) notice, even though the Court in *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986) had rejected a similar 120-day extension for service established by federal rule.

These holdings of the Second Circuit Court of Appeals embody several distinct and separate findings which the Sec-

2 This conclusion of the Second Circuit rests on no New York case law. In addition, it assumes, contrary to the express language of CPLR § 203(b)(5), that the 60-day extension is available for effecting service on a defendant other than the one named in the complaint which is filed. Filing of a complaint against the party to be served is a statutory prerequisite for obtaining the 60-day extension.

ond Circuit substituted without due regard for the contrary findings of the District Court or the appropriate standards of review. Principal among these is the Second Circuit's finding of waiver of the defective service.

The factual bases upon which the Second Circuit "found" a waiver "under all the circumstances" were that respondents were misled by Teledyne, Inc.'s use of the name "Teledyne" in a number of its subsidiary companies and that Teledyne Inc.'s counsel participated in a scheduling conference without orally reminding respondents about the defective service of process. Although Teledyne, Inc. had put respondents on notice of this defense in its answer timely filed three weeks before, the Court of Appeals held that Teledyne Industries, Inc. (which the Court of Appeals treated interchangeably with Teledyne, Inc.),³ through Teledyne, Inc.'s counsel, participated in the scheduling conference without "promptly complain[ing]" about the defective service of process when, in the Second Circuit's opinion, respondents had eight days remaining in the 60-day period in which to cure the defective service.⁴

Each of these factual and legal arguments had been presented to the District Court, which found respondents' contention of waiver to be "wholly without merit". (App. 18a n.1).

The District Court found that Teledyne, Inc. and Teledyne Industries, Inc. are separate legal entities, not interchangeable for purposes of this litigation. (App. 22a). The District Court further found that respondents sued, and intended to sue the

3 Without any factual predicate or due regard to the contrary findings of the District Court (App 22a & n.4), and despite their separate legal status as corporations, the Second Circuit treated Teledyne, Inc. and Teledyne Industries, Inc. interchangeably, as if having an unspoken "identity of interest". See *Schiavone*, 477 U.S. at 28. The Second Circuit held that counsel who appeared for one company (Teledyne, Inc.) by his inaction waived any defense of insufficient service that might have been raised by another company (Teledyne Industries, Inc.), which did not appear in the action.

4 See note 2, *supra*.

named defendant Teledyne, Inc., not Teledyne Industries, Inc., (App. 20a, 33a), and rejected, as "without merit", respondents' claim that "somehow defendant Teledyne was responsible for plaintiff's confusion in this regard."⁵ (App. 20a n.3). The District Court stated:

Based on plaintiffs' counsel's past and ongoing litigation against these two corporate entities, the claim of confusion rings hollow. In any event, if plaintiffs were uncertain about the correct corporate affiliation of TCM, discretion dictated naming both Teledyne and Teledyne Industries in this action.

(App. 20a n.3).

The District Court considered respondents' argument that counsel for Teledyne, Inc., at an initial scheduling conference to establish a schedule for discovery and motions, failed to remind respondents' counsel of the defense of insufficient process interposed in the answer and rejected as "wholly without merit" respondents' claim that Teledyne, Inc. "somehow waived the defenses that form the basis of the motions to dismiss", or that respondents were prejudiced. (App. 18a n.1, 30a). The District Court, reviewing the case law, noted that the defenses were properly preserved by answer pursuant to Fed. R. Civ. P. 12(b) and the subject of prompt motions to dismiss, which "hardly justifies characterizing defendant as 'dilatory' ". (App. 18a n.1).

The Second Circuit did not find any of these factual findings, for which there was support in the record, clearly erroneous. Nor did the Second Circuit find the District Court's decision rejecting waiver to be an abuse of discretion, or legal

5 The Second Circuit found that because "Teledyne Industries, Inc. has chosen to do business with a name that used the key word of its parent's name" (App. 9a), it has taken a risk and will be considered acceptably described in the present, and presumably any future complaint against "Teledyne, Inc." The Second Circuit's finding is without precedent and sweeping in its effect upon every major parent corporation which, as the umbrella to affiliated subsidiaries, uses a common trade name throughout its corporate hierarchy.

error. Instead the Second Circuit made its own findings which it substituted for those of the District Court, and concluded, "under all the circumstances", that "this defendant [Teledyne Industries, Inc., which had not appeared at all in the action] sufficiently participated in proceedings in the Western District to have waived lack of personal service of process. . . ." (App. 5a).

Similarly, although the Second Circuit found no abuse of discretion by the District Court in denying leave to amend under Rule 15(c), the Second Circuit reversed the District Court and ordered that respondents could "amend the complaint to designate properly the name of the defendant, Teledyne Industries, Inc."⁶ (App. 16a).

6 In holding that respondents could "amend" the complaint to designate properly the name of the defendant, Teledyne Industries, Inc. (App 16a), the Second Circuit necessarily held that even though Teledyne, Inc. had not been properly served and was not subject to the personal jurisdiction of the District Court (App. 7a, 10a, 11a), Teledyne Industries, Inc. could properly be "substituted" as a party under Rule 15(c) for a company over which the Court had not obtained jurisdiction (namely Teledyne, Inc.).

Reasons for Granting The Writ

On the issue whether petitioner, by its conduct "under all the circumstances", waived its defense of insufficient service of process, the Second Circuit substituted its judgment for the findings of the District Court. In so doing, the Second Circuit "has decided a federal question in a way in conflict with applicable decisions of the Court". Sup. Ct. R. 10.1(c). As recently as last term, in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), the Court held that federal appeals courts must apply a deferential standard to rulings of the district courts, especially rulings based on factual determinations.

The drafters of Federal Rule 12 designed the rule to protect against "unintended waiver" of a jurisdictional defense. Fed. R. Civ. P. 12(h) advisory committee's note. If the rule were followed and a defense were timely raised, such defense should be deemed waived only by conscious assent or by conduct of the defendant under the circumstances. The Second Circuit gave no deference to the trial court's finding, based upon the facts and circumstances before the trial court, that there was no waiver. The failure of the Second Circuit to apply a deferential standard of review to rulings of the District Court rejecting a waiver of a valid and timely interposed defense was in conflict with the decisions of the Court in cases such as *Cooter & Gell*, *supra*, and several Circuit Courts of Appeal.

In addition, the Second Circuit's reversal of the District Court's decision denying respondents' motion to amend to name an additional party, without finding that the District Court abused its discretion, was also contrary to the decisions of this Court and the decisions of several circuits.

The factual basis upon which the Second Circuit found waiver raises an equally important issue. For practicing attorneys before Federal and State courts, the Second Circuit ignored the ethical obligation imposed on the profession that,

within the rules and statutes governing his conduct, an attorney must zealously represent and protect his client's interests.

The Second Circuit condemns petitioner's attorney and penalizes his client because the attorney, after raising the defense of insufficient service in the answer, did not remind or advise his adversary, at a scheduling conference, that extraterritorial mail service is ineffective. Petitioner's attorney is charged with failing to tell his adversary how his client, the defendant, could be timely sued.

This issue which petitioner brings to the Court and the context in which it arises is both simple and fundamental: Should an attorney be deemed to waive for his client a defense of insufficient service, timely interposed in accordance with Federal Rule 12, because the attorney did not advise his adversary of the particular defect in sufficient time so that the defect could be cured.

The decision of the Second Circuit strikes at the underpinnings of our adversarial system. Under the decision of the Second Circuit, a counsel's fidelity to his client's interests while acting in full compliance with the Federal Rules and the Model Code of Professional Responsibility, paradoxically has brought about a waiver of his client's defenses.

In this decision, the Second Circuit, it may truly be said, has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision.

Sup. Ct. R. 10.1(a).

I

THE SECOND CIRCUIT HAS DECIDED A FEDERAL QUESTION INVOLVING THE APPROPRIATE STANDARD OF REVIEW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE COURT

In the case at bar, the Court of Appeals failed to apply the correct deferential standard of review of the District Court's decision on the alleged waiver of a Rule 12 defense. The Court of Appeals' decision, which only substitutes its findings for those of the District Court, conflicts with decisions of the Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), *Amadeo v. Zant*, 486 U.S. 214 (1988), and *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990).

In this case, upon all the circumstances, the District Court found that petitioner did not waive its defense of lack of jurisdiction based on insufficient service of process. On review, the Second Circuit gave no deference whatever to the District Court's finding that no waiver had occurred. The Court of Appeals thereupon made findings of its own—that petitioner's attorney waived the defense of insufficient service by his silence at a scheduling conference, and by his failure to inform his adversary that respondents' extraterritorial mail service was ineffective.

In a recent series of decisions, culminating in *Cooter & Gell*, the Court has underscored the deference which must be given

to the determination of courts on the front lines of litigation [to] enhance these courts' ability to control the litigants before them . . . [and] streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court. . . .

110 S. Ct. at 2460.

The Court's recent decisions recognize that the principles of appellate review embodied in Rule 52(a) apply equally to

pretrial fact finding and that District Court determinations should be reviewed under a deference standard.

In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the Court reversed the appeals court for not applying the Rule 52(a) standard, and instead "improperly conduct[ing] what amounted to a de novo weighing of the evidence in the record." 470 U.S. at 576. The Court emphasized:

If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.

470 U.S. at 573-574 (citation omitted).

In *Amadeo v. Zant*, 486 U.S. 214 (1988), a federal habeas corpus case, the Court reversed the appeals court which, in violation of Rule 52(a), had "simply expressed disagreement and substituted its own factual findings for those of the District Court." *Id.* at 223.

Most recently, in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), the Court adopted a deferential standard of review of a district court's imposition of sanctions under Rule 11. The Court's analysis in *Cooter & Gell* on whether a mixed issue of fact and law should be decided under a factual or legal standard is equally applicable here. Whether there has been a waiver of a timely asserted defense is not a purely legal question. As in *Cooter & Gell*, the issue is "rooted in factual determinations." *Id.* at 2459. The Second Circuit itself stated, in this case, the issue of waiver involves consideration of "all the circumstances". (App. 12a).

The circumstances trial courts consider in deciding waiver of a timely-asserted defense include the delay in moving to dismiss based on the defense, the extent and nature of pre-trial participation in the litigation, and prejudice to the other party. Thus a district court's ruling on waiver is, like the

Rule 11 determination presented in *Cooter & Gell*, "fact-specific", and sometimes involves "fact-intensive, close calls." 110 S. Ct. at 2460.

As the Court stated in *Cooter & Gell*, "[f]amiliar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by", in this case, the doctrine of waiver based upon pretrial participation in litigation. 110 S. Ct. at 2459. This conclusion also flows from the Court's observation in *Pierce v. Underwood*, 487 U.S. 552 (1988):

It is especially common for issues involving what can broadly be labeled 'supervision of litigation,' which is the sort of issue presented here, to be given abuse-of-discretion review. See, e.g., *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (attorney's fees); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (discovery sanctions); see generally 1 S. Childress & M. Davis, *Standards of Review* §§ 4.1-4.20, pp. 228-286 (1986).

487 U.S. at 558-559 n.1.

The Court's treatment of an analogous defense further supports a deferential standard of review of a District Court's determination that no waiver was committed. The Court long ago determined that a deferential standard of review was proper on the issue of laches, an equitable cousin of waiver. In *Gardner v. Panama R.R.*, 342 U.S. 29 (1951), the Court stated that "the existence of laches is a question primarily addressed to the discretion of the trial court" *Id.* at 30-31. See also *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 215 (1963) (reversing the circuit court where the district court ruling on laches was not plainly erroneous).

This deferential standard of review, it is submitted, must apply to the issue of a waiver of a defense timely asserted, if

the Court's recent decisions are to have any practical meaning and effect.

The Second Circuit in this case simply ignored the deferential standard of review established by the Court. In the language of *Amadeo v. Zant*, the Second Circuit, "without examining the record or discussing [the appropriate standard of review,] . . . simply expressed disagreement and substituted its own factual findings for those of the District Court." 486 U.S. at 223.

II

THERE IS ALSO A CONFLICT AMONG THE CIRCUITS ON THE APPROPRIATE STANDARD OF REVIEW OF WAIVER OF A DEFENSE

In its opinion, the Second Circuit essentially applied a *de novo* standard of review on the issue of waiver of a Rule 12 defense. This holding is illustrative of the continued practice of some circuits, when considering such pretrial issues as waiver, to conduct a *de novo* review, inconsistent with the deferential standard established by the Court and in conflict with other circuits.

The Fifth Circuit had held, for example, that the analogous waiver of an arbitration defense to civil litigation, is a question of fact dependent on the extent of pretrial participation, delay and prejudice to the other party. *Burton-Dixie Corp. v. Timothy McCarthy Constr. Co.*, 436 F.2d 405, 408 (5th Cir. 1971) ("The question depends upon the facts of each case and usually must be determined by the trier of facts"). A few years later, the Fifth Circuit appeared to reverse direction, stating in *Southwest Indus. Import & Export, Inc. v. Wilmod Co.*, 524 F.2d 468 (5th Cir. 1975): "We consider the question of waiver to be a conclusion of law not subject to the strictures of limited review dictated by F.R.Civ.P. 52(a) as to factual findings of the Trial Court." *Id.* at 470 n.3.

In 1986, applying the Court's recent decision in *Anderson v. Bessemer City*, the Fifth Circuit reversed course again, holding: "It appears to us that a finding that a party has waived its right to arbitration is a legal conclusion subject to our plenary review, *but* that the findings upon which the conclusion is based are predicate questions of fact, which may not be overturned unless clearly erroneous." *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1159 (5th Cir. 1986) (emphasis in original).

The Seventh and Tenth Circuits independently reached similar results in *Banner Indus., Inc. v. Central States, S.E. and S.W. Areas Pension Fund*, 875 F.2d 1285, 1289 (7th Cir.), cert. denied, 110 S. Ct. 563 (1989), *Reid Burton Constr., Inc. v. Carpenters Dist. Council*, 614 F.2d 698 (10th Cir.), cert. denied, 449 U.S. 824 (1980) and *Midamerica Fed. Sav. and Loan Ass'n v. Shearson/American Express, Inc.*, 886 F.2d 1249, 1259 (10th Cir. 1989).

The Second Circuit, consistent with its approach in this case, held to the contrary in *Rush v. Oppenheimer & Co.*, 779 F.2d 885 (2d Cir. 1985), concluding that "the question of waiver of arbitration is one of law . . . and is fully reviewable on appeal free from the clearly erroneous standard of Rule 52(a)" *Id.* at 887 (citation omitted). *Rush* relied on the Fifth Circuit decision in *Wilmod Co.* which was thereafter overruled in light of the Court's intervening decision in *Anderson v. Bessemer City*. *Rush* also was based on the assumption that a *de novo* review standard applies where the facts are undisputed, a notion the Court rejected in *Anderson*, which likewise involved "essentially undisputed" facts. 470 U.S. at 576.

The First, Fourth, Eighth, Ninth and D.C. Circuits, notwithstanding the questionable foundation on which the Second Circuit's *Rush* decision rests, nevertheless have followed *Rush*, or the discredited Fifth Circuit decision in *Wilmod Co.* on which *Rush* is based. See *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 294 n.2 (1st Cir. 1986); *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*,

817 F.2d 250, 251-52 (4th Cir. 1987); *Ackerberg v. Johnson*, 892 F.2d 1328, 1332 (8th Cir. 1989); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 693 (9th Cir. 1986); *National Found. For Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987).

While the particular defense at issue in those cases is different from the defense at issue in the case at bar, the standard of review for waiver of either of the defenses is the same, indicating a continuing conflict among the circuits on the standard of review of pretrial determinations of waiver.

III

THE SECOND CIRCUIT'S *DE NOVO* FINDING OF WAIVER OF A JURISDICTIONAL DEFENSE TIMELY ASSERTED BY ANSWER, THROUGH ATTENDANCE AT A SCHEDULING CONFERENCE THREE WEEKS LATER, IS SO FAR A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS AS TO CALL FOR THE COURT'S REVIEW

"Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). In this case both the District Court and the Second Circuit held that mail service upon Teledyne, Inc. (or Teledyne Industries, Inc.) in Alabama was ineffective because extraterritorial service of summons by mail is not permitted under Federal Rule 4(f) or under New York law.

Under the Federal Rules, an objection to service of process may be raised in a responsive pleading or by motion pursuant to Rule 12(b). Fed. R. Civ. P. 12(b), (h). As contemplated by the drafters, compliance with the Rules will preclude an "unintended waiver." Fed. R. Civ. P. 12(h) advisory committee's note. Teledyne, Inc. followed the Rules precisely and timely raised the defense of insufficient service in its answer.

As the Court recognized in *Conley v. Gibson*, 355 U.S. 41 (1957): "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim", or a defendant his defense. *Id.* at 47.

To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both the claim *and defense*. . . .

Id. at 47-48 (emphasis supplied).⁷

Having given "notice" in its "pleading" of its defense of insufficient service, what rule or statute obligated Teledyne, Inc.'s attorney to come forward and advise his adversary that extraterritorial service by mail was ineffective? Consistent with his ethical obligations and the duty of fidelity he owes his client, how can an attorney advise his adversary of defective service so his adversary can perfect a lawsuit against his client? How does an attorney zealously represent his client's interest if he gratuitously waives a dispositive defense?

Ignoring these ethical considerations, this is precisely what the Second Circuit ruled that Teledyne, Inc.'s attorney should have done at the scheduling conference: advise his adversary with specificity of the defective service so that his adversary

⁷ In accordance with the principles of notice pleading enunciated in *Conley*, once put on notice by answer, respondents could have brought a Rule 12(f) motion within 20 days of the answer to test the merits of the asserted affirmative defenses, *Conley*, 355 U.S. at 48 n.9, particularly where respondents filed their action so close to the end of the limitations period. Respondents had more than sufficient time to do so within the 60-day period provided by CPLR § 203(b)(5), even if § 203(b)(5) were applicable to extend the time for service in this case. As stated a district court in a similar case, respondents "chose not to do so here, and cannot now escape the consequences of that choice." *Wilson v. Kuwahara Co.*, 717 F. Supp. 525, 528 (W.D. Mich. 1989).

could cure the error. Because Teledyne, Inc.'s attorney did not do that, the Second Circuit penalized the petitioner and found a "waiver" of the defense of insufficient process.

Under Canon 7 of the applicable Model Code of Professional Responsibility (1970), *reprinted in* N.Y. Jud. Law app. (McKinney 1975), the duty of a lawyer, "both to his client and to the legal system, is to represent his client zealously within the bounds of the law. . . ." EC 7-1. Disciplinary Rule 7-101(A) under this Canon provides in relevant part:

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules

. . . .

(3) Prejudice or damage his client during the course of the professional relationship

DR 7-101(A). ~~Canon 7~~ further provides that "in civil cases, it is for the client to decide whether he will . . . waive his right to plead an affirmative defense." EC 7-7.

In Ethical Opinion 1215 of the Virginia State Bar (Jan. 31, 1989), *reprinted in summary in ABA/BNA Lawyers' Manual on Professional Conduct*, at 30 (June 20, 1990), the Model Code of Professional Responsibility was applied in a case in which a lawyer for a criminal defendant was silent when the trial date was continued to a date one day after the time limitation for prosecution of the felony. The Standing Committee on Legal Ethics ruled that the lawyer had no legal obligation to reveal the limitations period, and that he may not reveal it if the disclosure will harm or prejudice his client.

Similarly, in Ethical Opinion 88-63 of the Maryland State Bar Association (May 31, 1988), *reprinted in 4 ABA/BNA Lawyer's Manual on Professional Conduct, Current Reports*, at 228-229 (No. 13, July 20, 1988), the equivalent Model Rules of Professional Conduct were applied to a civil case where a defendant's lawyer remained silent after having the

action against his client dismissed following removal to a court of record, when he knew that opposing counsel believed that the original action was still pending and would soon miss the deadline for refiling. The Committee on Ethics ruled that, without his client's consent, the defendant's lawyer "may not ethically tell opposing counsel of the statute of limitations." *Id.* at 229.

At the initial status conference in this case, if petitioner's counsel had gratuitously advised respondents' counsel of the defective service of process, after putting respondents on timely notice three weeks before by answer, petitioner's counsel would have failed to represent his client zealously and, in effect, would have waived a jurisdictional defense already asserted, without his client's consent.

This ethical responsibility of an attorney to his client is fundamental to our adversary system of justice and should not be compromised by the *de novo* pronouncement of the Second Circuit in this case that counsel's fidelity to his client's interests, in full compliance with the Federal Rules, paradoxically constituted waiver of his client's defenses. *Cf. Jones v. Barnes*, 463 U.S. 745 (1983); see generally A. Goldman, *The Moral Foundations of Professional Ethics*, pp. 92-98 (1982).

There is no legal basis in the decisional law to support a finding of waiver by silence at a pretrial conference within three weeks after the timely assertion and preservation of a jurisdictional defense. See, e.g., *Way v. Mueller Brass Co.*, 840 F.2d 303, 306 (5th Cir. 1988); *Wilson v. Kuwahara Co.*, 717 F. Supp. 525, 527-28 (W.D. Mich. 1989). In fact, the Second Circuit in this case agreed with the District Court that *Burton v. Northern Dutchess Hosp.*, 106 F.R.D. 477 (S.D.N.Y. 1985) and *Vozeh v. Good Samaritan Hosp.*, 84 F.R.D. 143 (S.D.N.Y. 1979), involving 2 and 3-year delays in bringing a motion to dismiss, do not support finding waiver in this case. (App. 12a).

The recent decision of the Fifth Circuit in *Way*, which conflicts with the decision of the Second Circuit, is closely on

point. In *Way*, defendant asserted the defense of invalid service of process in its answer, and after the 120-period for service under Rule 4(j) had passed, moved to dismiss. Plaintiff's counsel, admitting he did not realize he had served the wrong person until the motion to dismiss, contended that defendant nevertheless had waived the defect. The district court granted the motion and the Fifth Circuit affirmed the district court. 840 F.2d at 306.

The Federal Rules, petitioner submits, were designed to accomplish substantial justice to those parties which follow them. The decision of the Court of Appeals in this case holds that petitioner's counsel should have abandoned his client's interests and advised his adversary of the defective service so that his adversary could timely sue his client. This startling holding is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

IV

THE DECISION OF THE COURT BELOW ON RULE 15(c) IS ALSO INCONSISTENT WITH THE APPLICABLE STANDARD OF REVIEW AND IN CONFLICT WITH THE COURT'S DECISION IN *SCHIAVONE V. FORTUNE, AKA TIME, INC.*, 477 U.S. 21 (1986)

As with its holding with respect to Rule 12, the Second Circuit failed to apply the correct standard of review in reviewing the District Court's denial of leave to amend the complaint under Rule 15(a) and (c). Such a denial may be set aside only for abuse of discretion, which the Court of Appeals did not find. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330 (1971); *Kilkenny v. Arco Marine, Inc.*, 800 F.2d 853, 856, 858 (9th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987); *Williams v. United States Postal Serv.*, 873 F.2d 1069, 1072-73 (7th Cir. 1989).

The Court in *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986) held that a plaintiff could amend his com-

plaint to bring in the proper party defendant under Rule 15(c), provided the party to be brought in received notice of the action within the applicable limitations period. In *Schiavone*, the Court held that the limitations period contemplated in Rule 15(c) was the actual statute of limitations, not the period of 120 days within which a plaintiff could timely effect service under Rule 4(j).

In this case, Teledyne Industries, Inc., the party respondents sought to bring in, received notice after the statute of limitations period, but within the 60-day period for service permitted under CPLR § 203(b)(5). The Second Circuit held, in its decision on rehearing, that the 60-day service provision of CPLR § 203(b)(5) constitutes an extension of the limitations period within the meaning of Rule 15(c). In so ruling, the Second Circuit assumed, without statutory support, that CPLR § 203(b)(5) was available for service upon a defendant not named in the complaint filed.⁸

With this assumption, the Second Circuit further ignored the holding in *Schiavone* that the phrase "the applicable limitations period" found in the Advisory Committee's note to Rule 15(c) means just that and may not be extended by any service provisions, federal or state. 477 U.S. at 30-31. While the Court in *Schiavone*, a diversity case involving a New Jersey statute of limitations, expressly addressed only the federal period for service allowed by Rule 4(j), the state tolling issue was discussed by the dissenting justices. *Id.* at 37 n.4 (Stevens, J. dissenting).

Although, in diversity, state procedures govern in the absence of a controlling federal rule or statute, *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), state procedure does not govern where federal law states a conflicting rule of procedure, as in the case of the notice period allowed for relation back, which the Court held in *Schiavone* is provided in Rule 15(c). *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). The only federal court which has squarely addressed this issue has held, contrary to the Second Circuit herein, that state tolling

⁸ See note 2, *supra*.

provisions for effecting service are inapplicable under Rule 15(c). See *Odench v. Salmonson Ventures*, 108 F.R.D. 163, 169 & n.5 (D.R.I. 1985).

While the decision of the Court in *Schiavone* has been criticized by legal writers,⁹ and will be overturned if amendments to Rule 15(c) presently under consideration are put into effect,¹⁰ the court below has clearly chosen to ignore the teachings of *Schiavone* to effect a desired result.

For the same reason, the Second Circuit found waiver of petitioner's defense of insufficient service.

In *Schiavone*, the Court rejected a "choice . . . between recognizing or ignoring what the Rule[s] provide[] in plain language," 477 U.S. at 30, and affirmed the circuit court holding in *Schiavone* that "it is not this [circuit] court's role to amend procedural rules in accordance with our own policy preferences." *Schiavone v. Fortune*, 750 F.2d 15, 18 (3d Cir. 1984), *aff'd*, 477 U.S. 21 (1986).

As the Court observed in *Schiavone*, on facts virtually indistinguishable from this case, but which the Second Circuit refused to accept,

there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process.

9 See Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 Notre Dame L. Rev. 720 (1988); Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S. Cal. L. Rev. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 Mich. L. Rev. 1507 (1987).

10 The Advisory Committee on the Civil Rules recently reported proposed changes to Rule 15(c) which, if adopted, will overturn the result in *Schiavone* by recognizing a federal 120-day service period extending the limitations period for purposes of providing Rule 15(c) notice, and state service provisions. See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, Proposed Rule 15(c)(1),(3), 127 F.R.D. 237, 309-312 (1989).

477 U.S. at 31. The District Court, following *Schiavone*, did recognize this, stating, "this mischief was caused in part and exacerbated by plaintiff's decision to begin the lawsuit with only four days remaining on the limitations' clock." (App. 30a).

The Court of Appeals, although conceding that respondents "needlessly made several missteps in initiating their lawsuit" (App. 15a), and that petitioner had not violated any rule, nevertheless reversed the District Court, devising its own findings and its own rule contrary to appropriate standards of review established by the Court, Federal Rules 12 and 15, and the Model Code of Professional Responsibility.

The decision of the Second Circuit, in conflict with the decisions of the Court and of several circuits, should be set aside and reversed.

CONCLUSION

For the reasons set forth above, petitioner urges that this petition for a writ of certiorari be granted.

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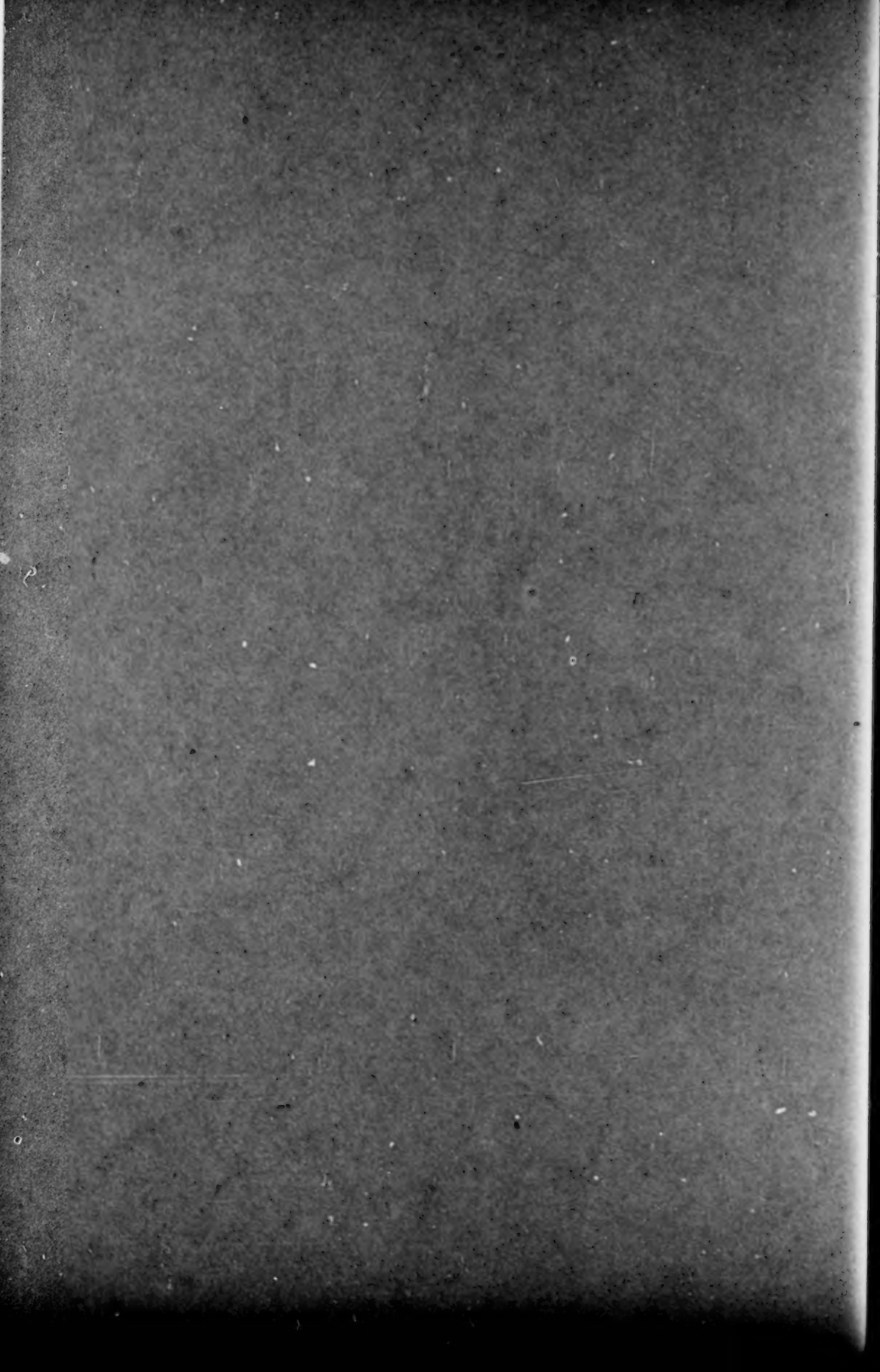
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APPENDIX



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 622—August Term 1989

On petition for rehearing

Decided: May 2, 1990

Docket No. 89-7916

MARJORIE DATSKOW, Executrix of the Estates of Robert C. Gross and Susan C. Gross, deceased, and Administratrix of the Estates of Michael and David Gross, deceased, and GROSSAIR, INC.

Plaintiffs-Appellants,

—v.—

TELEDYNE, INC., Continental Products Division,

Defendant-Appellee.

Before:

MESKILL and NEWMAN, *Circuit Judges,*
and POLLACK, *Senior District Judge.**

PER CURIAM:

Appellee petitions for rehearing, contending that our decision of March 23, 1990, improperly permitted amendment of the complaint contrary to the requirements of Rule 15(c) of the Federal Rules of Civil Procedure. As appellee points out, that Rule applies to amendments that seek not only to bring

* The Honorable Milton Pollack of the District Court for the Southern District of New York, sitting by designation.

in a party not previously named but also "to correct a misnomer or misdescription of a defendant," Fed.R.Civ.P. 15(c) advisory committee's note. *See Ingram v. Kumar*, 585 F.2d 566, 570 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979). Rule 15(c) permits relation back where, within the limitations period, the party sought to be brought in or the party whose name is sought to be corrected received notice of the institution of the action and knew or should have known that it was the party being sued.

In this case, Teledyne Industries, Inc. acknowledged receipt of notice of the complaint no later than December 5, 1988. Though that notice was not accomplished by proper service, there is no requirement that the "notice" required by Rule 15(c) meet the formalities of service. The Advisory Committee explicitly stated that the notice required by Rule 15(c) "need not be formal." And there can be no doubt that Teledyne Industries, Inc. knew from the complaint that it was the party being sued.

Nevertheless, appellee contends that the notice it received arrived beyond the relevant two-year statute of limitations. But New York extends its normal limitations period for 60 days under certain circumstances, *see* N.Y.Civ.Prac. L. & R. § 203(b)(5) (McKinney Supp. 1990), and we concluded in our original decision that those circumstances applied to this case. There is no dispute that Teledyne Industries, Inc. received notice within the 60-day extension period.

Finally, appellee contends that reliance on the 60-day extension period to validate the notice is precluded by *Schiavone v. Fortune*, 477 U.S. 21 (1986). We disagree. *Schiavone* rejected the timeliness of notice, alleged to satisfy Rule 15(c), that was received after the expiration of a state's limitation period but within the 120-day time for service of process permitted by Rule 4(j). 477 U.S. at 30. Timeliness of such notice had previously been upheld by this Court, *see Ingram v. Kumar*, 585 F.2d at 571-72, but that point was not accepted by *Schiavone*, as we subsequently recognized in *Unger v. Caloric Corp. (In re All Brand Appliance & Televi-*

sion Co.), 875 F.2d 1021, 1024-25 (2d Cir. 1989). In the pending case, however, plaintiffs are not seeking to use Rule 4(j)'s 120-day time period for service to validate their Rule 15(c) notice to Teledyne Industries; they are relying on the 60-day extension period that New York adds to its own limitations period. In this respect, our case differs from *Ingram*, where notice of the correctly identified defendant was not given until well after the 60-day period provided by section 203(b)(5). The notice here satisfies Rule 15(c), and the amendment will relate back to the date of the original complaint.

The petition for rehearing is denied.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 622—August Term 1989

Argued: January 10, 1990

Decided: March 23, 1990

Docket No. 89-7916

MARJORIE DATSKOW, Executrix of the Estates of Robert C.
Gross and Susan C. Gross, deceased, and Administratrix
of the Estates of Michael and David Gross, deceased, and
GROSSAIR, INC.,

Plaintiffs-Appellants,

—v.—

TELEDYNE, INC., Continental Products Division,

Defendant-Appellee.

Before:

MESKILL and NEWMAN, *Circuit Judges,*
and POLLACK, *Senior District Judge.**

Appeal from a judgment of the District Court for the
Western District of New York (David G. Larimer, Judge) dis-
missing plaintiffs' complaint for lack of personal jurisdiction
and insufficiency of service of process.

Reversed and remanded.

* The Honorable Milton Pollack of the District Court for the South-
ern District of New York, sitting by designation.

ARTHUR ALAN WOLK, Philadelphia, Pa.
 (Catherine B. Slavin, Wolk, Genter & Harrington, Philadelphia, Pa.; Anthony J. Adams, Jr., Michael Townsend, Davidson, Fink, Cook & Gates, Rochester, N.Y., on the brief), for *plaintiffs-appellants*.

STEPHEN R. STEGICH III, Rochester, N.Y.
 (George G. Mackey, Robert W. Ludwig, Jr., Mackey & DiMarco, Rochester, N.Y.; Condon & Forsyth, New York, N.Y., on the brief), for *defendant-appellee*.

JON O. NEWMAN, *Circuit Judge*:

This appeal of a diversity case raises a host of issues concerning personal jurisdiction, service of process, the statute of limitations, and the identification of a party defendant. The issues arise on an appeal by Marjorie Datskow, as executrix and administratrix, and Grossair, Inc. from the August 9, 1989, judgment of the District Court for the Western District of New York (David G. Larimer, Judge) dismissing for lack of personal jurisdiction and insufficiency of service of process their complaint against a defendant identified as "Teledyne, Inc., Continental Products Division." The suit sought damages for the manufacture of an aircraft engine that allegedly failed, causing the crash of a single-engine plane and the death of plaintiff Datskow's decedents. We conclude that the plaintiffs sufficiently made clear their intention to sue the manufacturer of the engine, Teledyne Industries, Inc., that this defendant is amenable to the jurisdiction of the Western District, that this defendant sufficiently participated in proceedings in the Western District to have waived lack of personal service of process, and that the action is timely as to this defendant. We therefore reverse and remand.

BACKGROUND

The complaint alleges that on November 26, 1986, a Beechcraft Debonair single-engine plane crashed while approaching the airport at Winston-Salem, North Carolina, killing all persons aboard the plane. Among the dead were Robert C. Gross, his wife, and their two children. The plane was owned by Grossair, Inc., a New York corporation. Suit was brought by Marjorie Datskow, a Pennsylvania citizen, as executrix and administratrix of the decedents' estates, and by Grossair, Inc. The caption identified the defendant as "Teledyne, Inc. Continental Motors Division" located at "Box 90, Mobile, Alabama 36601." It is undisputed that there is located in Mobile, Alabama, an aircraft engine manufacturing plant operated under the name "Teledyne Continental Motors Aircraft Products, a Division of Teledyne Industries, Inc." This division will be referred to as "TCM." Teledyne Industries, Inc., a California corporation, is a wholly-owned subsidiary of Teledyne, Inc. The latter is a holding company with 39 subsidiaries, most of which use the name "Teledyne" in their corporate names. The mailing address of TCM is Box 90, Mobile, Alabama 36601. Appellee acknowledges that the engine on the ill-fated plane was rebuilt by TCM.

The complaint alleged causes of action for negligence, strict product liability, fraud, and breach of warranty. The executrix made claims under New York's survival and wrongful death statutes. *See* N.Y. Est. Powers & Trusts Law §§ 5-4.1-5-4.6, 11-3.2 (McKinney 1981 & Supp. 1989). In New York, the limitations period for a wrongful death action is two years, N.Y. Est. Powers & Trusts Law § 5-4.1(1) (McKinney Supp. 1989); for a survival action, it is three years, N.Y. Civ. Prac. L. & R. § 214 (McKinney Supp. 1989).

The complaint was filed in the District Court on November 22, 1988, just four days short of a two-year interval from the plane crash. On December 1, 1988, plaintiffs mailed a copy of the complaint and summons to the defendant, as identified in the caption, by certified mail, return receipt requested. A

receipt was returned, acknowledging receipt on December 5, 1988. On December 23, 1988, Teledyne, Inc., filed an answer, alleging numerous affirmative defenses including lack of personal jurisdiction, lack of proper service, and expiration of applicable statutes of limitations. On January 17, 1989, counsel for plaintiffs and for Teledyne, Inc. attended a conference with a magistrate at which scheduling of discovery and motions was discussed. Plaintiffs contend that some settlement discussions also occurred. No mention was made at the conference that TCM was in fact a division of Teledyne Industries, Inc. rather than Teledyne, Inc. or that either corporation had not received proper service of the complaint.

On April 21, 1989, defendant moved to dismiss on grounds of lack of personal jurisdiction, lack of proper service, and statute of limitations. Plaintiffs cross-moved for leave to amend the complaint to change the identification of the defendant to "Teledyne Continental Motors Aircraft Products, a Division of Teledyne Industries, Inc." The District Court granted the defendant's motion and denied the cross-motion. The Court essentially accepted the defendant's contention that plaintiffs had sued the wrong corporation, the holding company, Teledyne, Inc., instead of the subsidiary, Teledyne Industries, Inc. Based on this premise, the Court first ruled that Teledyne, Inc. was not amenable to the personal jurisdiction of the Western District under New York's long-arm provisions because this corporation was not doing business within New York, N.Y. Civ. Prac. L. & R. § 301 (McKinney 1972), and had not committed a tort outside New York causing injury to persons or property with the State, *id.* § 302(a)(3). The Court then ruled that Teledyne, Inc. had not been properly served because mail service is ineffective beyond the territorial limits of the state in which the district court sits.

The Court also upheld the statute of limitations defense as to the wrongful death action. Judge Larimer acknowledged that applicable New York law extends the normal statute of limitations for 60 days under certain circumstances. See N.Y. Civ. Prac. L. & R. § 203(b)(5) (McKinney Supp. 1990). The

literal terms of section 203(b)(5) require delivery of the summons to the sheriff of a county outside New York City in which the defendant resides or is doing business and service of the summons upon the defendant within 60 days after the expiration of the normal limitations period. The District Judge ruled that the statute was applicable to federal diversity suits and that filing with the appropriate district court clerk is equivalent to filing with the sheriff of the appropriate county. Nevertheless, he concluded, since Teledyne, Inc. was neither resident nor doing business in New York and since Teledyne, Inc. had not been properly served within the 60-day extension period, the two-year limitations period applicable to the wrongful death claim had not been tolled.

Judge Larimer rejected plaintiffs' argument that defendant had waived its defenses. He noted that the defenses had been asserted in the answer and presented by motion within six months of the filing of the complaint. Finally, the Judge denied plaintiffs' motion to redesignate the defendant because neither Teledyne, Inc. nor Teledyne Industries, Inc. had been served within the limitations period. Judgement was entered dismissing the complaint.

DISCUSSION

Judge Larimer was not insensitive to the predicament of the plaintiffs and the severity of the result that he reached. But he felt obliged to reach it as a court of limited jurisdiction, noting that the plaintiffs had waited until four days before the end of the limitations period to initiate the suit and then had not commenced it properly. We share the Judge's assessment of plaintiffs' deficiencies but reach a different result because we believe that plaintiffs did not select the wrong defendant but committed the lesser sin of mislabeling the right defendant and that the defendant's conduct, in the circumstances of this case, precludes it from complaining about the absence of personal service.

Plaintiffs identified the defendant in several ways. First, they made clear that the entity they wished to sue was the manufacturer of the engine in the plane that crashed. Appellee acknowledges that this engine was rebuilt by TCM, a division of Teledyne Industries, Inc. Second, they listed in the caption of the complaint the mailing address of the entity they wished to sue. There is no dispute that Box 90, Mobile, Alabama 36601, is the address of TCM, a division of Teledyne Industries, Inc. Third, they approximated the name of the entity they wished to sue in the caption of the complaint. The caption names "Teledyne, Inc. Continental Motors Division," and the correct name is "Teledyne Industries, Inc., Teledyne Continental Motors Aircraft Products Division." All of the words in plaintiffs' designation appear in the correct designation. The key difference, of course, is that plaintiffs identified the corporation entity as "Teledyne, Inc.," whereas the correct name of the corporate defendant is "Teledyne Industries, Inc."

Our first question is whether the plaintiffs named the wrong defendant or mislabeled the right defendant. In some circumstances, the identification of a defendant by the name of one corporation cannot fairly be regarded as a mislabeling of a different corporation intended to be sued. But the line between naming the wrong defendant and mislabeling the right one must be drawn in light of the context of the nomenclature created by the defendant and the labeling undertaken by the plaintiffs assessed against that context. Teledyne Industries, Inc. has chosen to do business with a name that uses the key word of its parent's name. It is part of a family of affiliated companies, most of which use the name "Teledyne" in their corporate name. In New York State, it operates several divisions, all of which use the name "Teledyne" in their division name. In Mobile, Alabama, the location of the plant that rebuilt the engine at issue in this case, Teledyne Industries, Inc. creates confusion as to its correct corporate name by maintaining a telephone listing under the designation "Teledyne-Teledyne Continental Motors Aircraft Products." At the site of its aircraft engine division, Teledyne

Industries, Inc. leads the public to believe that the division's corporate name is just "Teledyne," the designation that plaintiffs used in their complaint.

The circumstances of this case may usefully be contrasted with those in *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986). The complaint there identified the defendant as "Fortune." The intended defendant was Time, Inc. The complaint alleged libel in an article in Fortune magazine, and the issue containing the article had listed the correct corporate name of the publisher, Time, Inc. A majority of the Court concluded that an amendment to identify the defendant as Time, Inc. was properly to be viewed as bringing in a new party. Unlike *Schiavone*, in our case the name in the caption approximates the correct name of the defendant, the correct name is not readily identifiable, and the defendant has taken the risk of incorrect identification by conducting business under a name easily confused with those of its parent and its affiliated companies and divisions. Even on the quite different facts of *Schiavone*, it is significant that three members of the Supreme Court thought that the right defendant had been sued, but merely incorrectly named. *Id.* at 35-36 (Stevens, J., with whom Burger, C.F., and White, J., join, dissenting).

We conclude that plaintiffs' complaint sufficiently alerted Teledyne Industries, Inc. that it was the corporation being sued so that this case may be categorized as one of mislabeling. We therefore turn to the issues of personal jurisdiction, service of process, and statute of limitations, which Judge Larimer decided upon a contrary premise.

Though the parties dispute whether Teledyne, Inc. does business within New York, there appears to be no dispute that Teledyne Industries, Inc. does business in that State, where it operates several divisions. Teledyne Industries, Inc. is amenable to personal jurisdiction under section 301.

Service of process is more troublesome. The parties agree that the proper method of serving process in a diversity case is to be determined by federal law, *Hanna v. Plumer*, 380 U.S. 460 (1965), but they disagree as to what federal law pro-

vides. Plaintiffs contend that service of the complaint by certified mail was authorized by Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure. Defendant replies that Rule 4(f) limits mail service under Rule 4(c) to the territorial limits of the state in which the district court is located, and that Rule 4(e), permitting out-of-state service pursuant to state law, is unavailable because New York law did not permit mail service on foreign corporations until January 1, 1990. See N.Y. Civ. Prac. L. & R. § 312-a (McKinney Supp. 1990).

This Court has not previously considered whether the territorial limits of Rule 4(f) apply to the mail service authorized by Rule 4(c). However, numerous district courts have ruled that Rule 4(f) limits the scope of Rule 4(c) mail service. See *Thermo-Cell Southeast, Inc. v. Technetic Industries, Inc.*, 605 F. Supp. 1122 (N.D. Ga. 1985); *Olympus Corp. v. Dealer Sales & Service, Inc.*, 107 F.R.D. 300 (E.D.N.Y. 1985); *Reno Distributors, Inc. v. West Texas Oil Field Equipment, Inc.*, 105 F.R.D. 511 (D. Kan. 1985); *Daley v. ALIA*, 105 F.R.D. 87 (E.D.N.Y. 1985); *William B. May Co., Inc. v. Hyatt*, 98 F.R.D. 569 (S.D.N.Y. 1983); cf. *Davis v. Musler*, 713 F.2d 907 (2d Cir. 1983) (Rule 5(f) limits scope of Rule 4(d)). But see *Boggs v. Darr*, 103 F.R.D. 526 (D. Kan. 1984). This view is correct. There is no basis for believing that the adoption of mail service in 1983 was intended to permit disregard of Rule 4(f). The Advisory Committee on Civil Rules is currently seeking comment on a proposal to permit nationwide mail service for federal question cases, but the proposal would not permit personal jurisdiction to be obtained upon an out-of-state defendant by mail service in a diversity case, unless authorized by state law. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Rule 4l(2), 127 F.R.D. 266-84 (1989).

Though plaintiffs' mailing of the summons and complaint provided notice to defendant, it did not constitute proper service that permits the exercise of personal jurisdiction. Plaintiffs contend, nevertheless, that defendant waived proper service by participating in the litigation without questioning personal jurisdiction during the period prior to expiration of

the statute of limitations. A delay in challenging personal jurisdiction by motion to dismiss has resulted in waiver, even where, as here, the defense was asserted in a timely answer; see *Burton v. Northern Dutchess Hospital*, 106 F.R.D. 477 (S.D.N.Y. 1985); *Vozech v. Good Samaritan Hospital*, 84 F.R.D. 143 (S.D.N.Y. 1979). The delays in *Burton* and *Vozech*, however, were far longer than the few months in this case.

Nevertheless, under all the circumstances, we conclude that defendant's conduct bars it from complaining about the defective form of service. Defendant attended the conference with the magistrate and participated in scheduling discovery and motion practice. Nothing was said about defective service of process. As we hold, *infra*, the limitations period on the wrongful death claims had not yet run at the time of this conference, and it would have been simple for plaintiffs to make personal service on the defendant if the point had been mentioned. In fact, since Teledyne Industries, Inc. has operating divisions in New York, it probably would have been possible to serve the corporation by mail by sending the complaint to an agent at one of these divisions. Moreover, this is not a case where a defendant is contesting personal jurisdiction on the ground that long-arm jurisdiction is not available. We would be slower to find waiver by a defendant wishing to contest whether it was obliged to defend in a distant court. But here amenability of Teledyne Industries, Inc. to the jurisdiction of the Western District is clear, and defendant is complaining only about a defect in the form of service, one that could have been readily cured during the limitations period if defendant had promptly complained.

The final issue is whether the wrongful death claims are time-barred. Plaintiffs rely on the 60-day extension provision of N.Y. Civ. Prac. L. & R. § 203(b)(5). We have previously ruled that section 203(b)(5) is available to a plaintiff in a federal diversity suit. See *Personis v. Oiler*, 889 F.2d 424 (2d Cir. 1989). That decision, however, decided only that a federal diversity plaintiff may use section 203(b)(5) by complying literally with its terms, i.e., by delivering the summons to a

sheriff of the county in which the defendant resides or is doing business, if outside New York City, or the clerk of the appropriate county, if within New York City, and then making service within 60 days of the expiration of the normal limitations period. This case poses three further questions. May the federal diversity plaintiff deliver the summons to the federal counterpart of the designated state officials, i.e., the federal marshal instead of the county sheriff, or the district court clerk instead of the county clerk? If so, may delivery be made to a district court clerk outside of New York City? If so, may the required personal service of summons be waived by the defendant under the same circumstances that waiver occurs for purposes of personal jurisdiction?

In *Personis v. Oiler*, *supra*, the summons in that federal suit had been delivered to a county sheriff, thereby literally complying with the state statute. We therefore did not reach the issue now posed as to whether delivery may be made to federal counterparts of the designated state officials. *Id.* at 427. Several district courts have stated that federal court plaintiffs may deliver a summons to the federal counterparts of the state officials designated in section 203(b)(5). *See Levy v. Pyramid Co. of Ithaca*, 687 F. Supp. 48, 53 (N.D.N.Y. 1988), *aff'd without consideration of this point*, 871 F.2d 9 (2d Cir. 1989); *Gold v. Jeep Corp.*, 579 F. Supp. 256, 258 (E.D.N.Y. 1984); *Aro v. Lichtig*, 537 F. Supp. 599, 600 (E.D.N.Y. 1982); *Florence v. Krasucki*, 533 F. Supp. 1047, 1050-51 (W.D.N.Y. 1982); *Phoenix Mutual Life Insurance Co. v. Cervera*, 524 F. Supp. 70, 72-73 (E.D.N.Y. 1981); *Somas v. Great American Insurance Co.*, 501 F. Supp. 96, 97 (S.D.N.Y. 1980); *Zarcone v. Condie*, 62 F.R.D. 563, 568 (S.D.N.Y. 1974); *Bratel v. Kutsher's Country Club*, 61 F.R.D. 501, 502 (S.D.N.Y. 1973); *Myers v. Slotkin*, 13 F.R.D. 191, 194 (E.D.N.Y. 1952); *Nola Electric Co. v. Reilly*, 93 F. Supp. 164, 170 (S.D.N.Y. 1949).

We agree with the rationale of these decisions. Service of process must be timely made when a state statute of limitations specifies that service is necessary to toll a limitations period, *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980);

Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), but federal law may determine whether service has been made, *Hanna v. Plumer*, 380 U.S. 460 (1965). Thus, in *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984), we recognized that service was required to toll the state statute of limitations, but we applied the federal rules, and did so generously, in finding that service had been made. Section 203(b)(5) affords an extra 60 days beyond the normal limitations period when a summons is delivered to a designated state official within the normal limitations period and the summons is served within the 60-day period. The delivery requirement is not precisely an aspect of the method of service, which would be governed by federal law, nor is its precise method of accomplishment so integral a part of the state's tolling requirement as to require literal compliance with state law. The statute seeks to assure that within the normal limitations period the summons is delivered to an official who can be relied upon to make an official record of its receipt, thereby avoiding disputes as to timeliness of delivery. Permitting federal counterparts to serve this function does not impair any state interest in establishing limitations on the time for suit.

Judge Ryan made the point forcefully in the first of the line of district court decisions cited above:

There is no requirement that a litigant in an action pending in federal court call upon the services of a state official to either protect, enforce or enjoy the privileges granted to him by local law. The test to be applied under the rationale of *Erie R. Co. v. Tompkins*, [304 U.S. 64 (1938),] is whether the litigant is receiving the same treatment that he would have in a state court, and this does not prevent a federal court from administering the state system of law in its own way in connection with "details related to its own conduct of business."

Nola Electric Co. v. Reilly, 93 F. Supp. at 170 (quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 555 (1949).

The further question, however, is whether the federal court clerk may serve as the counterpart, not of the relevant county clerk, but of the relevant county sheriff. Had this suit been filed in state court, the plaintiffs would have been obliged to deliver the summons to the county sheriff, the designated official when the relevant county is outside New York City. Then-District Judge Altamari faced this problem in *Gold v. Jeep Corp.*, 579 F. Supp. 256 (E.D.N.Y. 1984), where the summons was also delivered to the district court clerk and the relevant county was outside New York City. Sensibly relying on Judge Ryan's rationale in *Nola Electric*, Judge Altamari found the delivery to be sufficient compliance with section 203(b)(5):

What particular individual or official shall be authorized to serve as the depository for receipt of the summons is . . . a detail [that] "does not affect substantial rights."

Id. at 258-59. Judge Altamari was concerned that a contrary result would create two separate rules within the Eastern District, one for cases within New York City and another for cases outside New York City. Though requiring delivery to the United States Marshal throughout the Western District would achieve a uniform rule, we agree with Judge Altamari that the clerk of a district court may serve as the depository for a summons, whether the relevant county is within or without New York City.

The final question is whether the requirement of personal service may be waived, once timely deposit has occurred. As we noted with respect to appellee's challenge to personal jurisdiction, the appellee received notice of the lawsuit within the 60-day period and within that period participated in the lawsuit. The same circumstances that sufficed to constitute a waiver of service for purposes of personal jurisdiction also waive service for purposes of strict compliance with section 203(b)(5).

The plaintiffs have needlessly made several missteps in initiating their lawsuit. But part of their problem was created by the preference of the Teledyne family of companies to oper-

ate under confusingly similar names. The plaintiffs have made it sufficiently clear that they wish to sue the company whose division rebuilt the engine alleged to have caused the fatal accident. They deposited the complaint with the district court clerk within the normal limitations period and gave notice of the complaint to the Continental Products Division, sufficient to cause a Teledyne lawyer to participate in the litigation, within the 60-day period of section 203(b)(5). Under all the circumstances, we conclude that the plaintiffs are timely proceeding against the right defendant.

Accordingly, the judgment is reversed and the cause remanded for further proceedings, including allowing the plaintiffs to amend the complaint to designate properly the name of the defendant, Teledyne Industries, Inc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
Civ. 88-1299L

MARJORIE DATSKOW, Executrix of the Estates of Robert C. Gross and Susan C. Gross, Deceased, and Administratrix of the Estates of Michael and David Gross, Deceased, 4105 Fields Drive, Lafayette Hill, Pennsylvania 19444

and

GROSSAIR, INC., 840 Winona Boulevard,
Rochester, New York 14617

Plaintiffs,

—v.—

TELEDYNE, INC. Continental Motors Division,
Box 90 Mobile, Alabama 36601

Defendant.

DECISION AND ORDER

This diversity case arises out of a fatal airplane crash that occurred in North Carolina on November 26, 1986, killing the pilot, Robert Gross, his wife, Susan Gross, and their two sons, David and Michael. The aircraft, a Beechcraft Debonair, Serial No. CD 578, Registration No. N9592Y, which was owned by the plaintiff Grossair, Inc. a New York corporation, crashed on approach to Smith-Reynolds Airport in Winston-Salem, North Carolina. The aircraft was equipped with a Continental IO-470-K model engine, Serial No. 92857-R which had been rebuilt by Teledyne Continental Motors Aircraft Products Division of Teledyne Industries, Inc. on April 15, 1985.

The plaintiff, Marjorie Datskow, is the sister of Robert Gross. She filed this action in the Western District of New York on November 22, 1988 against Teledyne, Inc. as the executrix of the estates of the decedents. The statute of limitations on this action expired four days later on November 26, 1988. See N.Y.E.P.T.L. § 5.4-c. Plaintiff purportedly served the summons and complaint on defendant by mailing two copies thereof, one by certified mail return receipt requested and one by first class mail, addressed to "TELEDYNE, INC. Continental Motors Division, Box 90, Mobile, Alabama 36601". The summons and complaint were received by Teledyne Continental Motors Division ("TCM") on December 5, 1988. On December 23, 1988, defendant Teledyne filed its Answer in which it asserted the affirmative defenses of lack of jurisdiction, improper service, and statute of limitations.

This diversity-based wrongful death action is presently before the court on defendant's motions to dismiss and for summary judgment and on plaintiff's motion to amend the complaint. For the reasons that follow, plaintiff's motion to amend the complaint is denied and defendant's motion to dismiss is granted.

DISCUSSION

Defendant moves for summary judgment and to dismiss¹ the complaint on the grounds that the court lacks personal jurisdiction over the defendant Teledyne, that the action is

1 Plaintiffs' claim that defendant somehow waived the defenses that form the basis of the motions to dismiss is wholly without merit. By its answer, defendant preserved its right to move to dismiss on the grounds now set before the court. Fed.R.Civ.P. 12(b). At the time that defendant filed its motions, this case had been filed approximately six months, a period of time that hardly justifies characterizing defendant as "dilatory". *Burton v. Northern Dutchess Hospital*, 106 F.R.D. 477 (S.D.N.Y. 1985) and *Vozeh v. Good Samaritan Hospital*, 84 F.R.D. 143 (S.D.N.Y. 1979) do not compel a contrary result. In those cases, the defendant waited 3½ and 2 years, respectively, before moving to dismiss.

time barred, and that service of process was improper. At oral argument, plaintiff moved for leave to amend the complaint and subsequently filed formal motion papers.

All the motions presently before the court, in one way or another, relate to the question of whether plaintiff has sued the proper party, that is, Teledyne, Inc. Defendant contends that it is not a proper party to the lawsuit and that plaintiff should have sued Teledyne Industries, Inc.

Teledyne, Inc. ("Teledyne"), the named defendant in this action, is a Delaware corporation with its principal place of business in Los Angeles, California. Teledyne is a holding company that does not itself engage in the business of designing, manufacturing, or selling aircraft engines, but which owns 39 separately incorporated subsidiaries, including Teledyne Industries, Inc. Teledyne Industries, Inc. ("Teledyne Industries") is a California corporation with its principal place of business in California. It has been authorized to do business in New York since November 24, 1966. Teledyne Continental Motors Division ("TCM") is an unincorporated division of Teledyne Industries, located in Mobile, Alabama. It is the entity that rebuilt the engine that is the subject of this lawsuit.

A. Defendant's Motion to Dismiss: Lack of Personal Jurisdiction

It is well settled that in a diversity action personal jurisdiction over a defendant is determined by reference to the law of the jurisdiction in which the court sits, *United States v. First National City Bank*, 379 U.S. 378, 381-82 (1965), in this case N.Y.C.P.L.R. §§ 302(a)(1) or 301. The burden of establishing jurisdiction over a defendant is upon the plaintiff. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899 (2d Cir. 1981). In the absence of an evidentiary hearing, which neither party in this case seeks, the plaintiff need make only a prima facie showing that jurisdiction exists, *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 768 (2d Cir. 1983), and this remains true notwithstanding a controverting presentation by

the defendant. *Marine Midland*, 664 F.2d at 904. Where the court does not conduct an evidentiary hearing, all pleadings² and affidavits are construed in the light most favorable to the plaintiff, and where any doubts exist, they are resolved in plaintiff's favor. *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir 1985).

Initially, plaintiffs contend that the lawsuit has been properly commenced against TCM. In what can only be read as an implicit acknowledgement that it has sued the wrong party³ plaintiff contends that "the mere fact that TCM is identified as a division of 'Teledyne, Inc.' rather than 'Teledyne Industries, Inc.' is insufficient to defeat jurisdiction." Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, Document No. 15, p. 19. Plaintiffs, however, did not commence this action against TCM. The caption to plaintiffs' complaint reads "TELEDYNE, INC. Continental Motors Division". In the body of the complaint the defendant is identified as "Teledyne, Inc." There is no mention of TCM. In any event, TCM is an *unincorporated* division of Teledyne Industries. As such, it has no separate

2 Plaintiffs' complaint omits any of the usual jurisdictional allegations, such as an allegation that the defendant is "doing business" or transacts business in New York.

3 Plaintiffs claim that the precise corporate affiliation of TCM was shrouded in mystery and that somehow defendant Teledyne was responsible for plaintiffs' confusion in this regard. Plaintiffs' claims are without merit. Plaintiffs' counsel has indicated in his rebuttal affidavit (Wolk Affidavit, para. 8) that as a result of prior litigation experience against both Teledyne and Teledyne Industries he was under the mistaken impression that TCM was a division of both Teledyne, Inc. and Teledyne Industries. Based on plaintiffs' counsel's past and ongoing litigation against these two corporate entities, the claim of confusion rings hollow. In any event, if plaintiffs were uncertain about the correct corporate affiliation of TCM, discretion dictated naming both Teledyne and Teledyne Industries in this action.

Even if this court were to accept plaintiffs' claim that ascertainment of the corporate identity was difficult, see *Schiavone v. Fortune*, 477 U.S. 21 (1986), the defendant Teledyne was not served within the statute of limitations, see § B *infra*, and service of process was not properly effected, see § C *infra*.

legal identity or existence apart from Teledyne Industries and is not amenable to suit in its own right.

Jurisdiction Under § 301. Contrary to plaintiffs' arguments, it is patently clear that plaintiffs have failed to make even a prima facie showing that the defendant Teledyne is "doing business" in New York sufficient to satisfy the requirements of § 301.

Under New York case law, a non-domiciliary subjects itself to personal jurisdiction in New York with respect to *any* cause of action if it is "engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of 'presence' in this jurisdiction." *Simonson v. International Bank*, 14 N.Y.2d 281, 285, 251 N.Y.S. 2d 433, 436 (1964), *quoted in McGowan v. Smith*, 52 N.Y.2d 268, 272, 437 N.Y.S.2d 643, 645 (1981). The non-domiciliary must be "doing business" in New York "not occasionally or casually, but with a fair measure of permanence and continuity." *Laufer v. Ostrow*, 55 N.Y.2d 305, 449 N.Y.S.2d 456, 458 (1982) (*quoting Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917)).

There is no dispute in this case that Teledyne is the parent corporation of Teledyne Industries, and that Teledyne did not manufacture or rebuild the airplane engine in question. Further, there is no dispute that Teledyne is not licensed or authorized to do business in the State of New York; that it has no registered agent within New York authorized to accept service of process; that it has no offices or real property in New York; that it does not pay taxes in New York; that it has no agents or employees in New York; that it does not directly engage in any distribution, solicitation, or advertising of any products in New York.

The *only* contact that plaintiff points to in support of a finding of personal jurisdiction under § 301 is the fact that Teledyne is a member of the New York Stock Exchange and, for those purposes, has a New York-based transfer agent. This contact is insufficient to establish jurisdiction under

§ 301. *Cf. Nordic Bank PLC v. Trend Group Ltd.*, 619 F.Supp 542 (S.D.N.Y. 1985) (foreign banks' sales of commercial paper through agent in New York did not constitute 'doing business'). Furthermore, the fact that Teledyne Industries, a wholly owned subsidiary of Teledyne, is authorized to do and does business in New York does not automatically confer jurisdiction over the parent corporation Teledyne. There has been no allegation much less a showing that Teledyne Industries is a mere department or agency of Teledyne. *See Taca International Airlines v. Rolls Royce of England*, 15 N.Y.2d 97 (1965); *Nordic Bank PLC v. Trend Group, Ltd.*, 619 F.Supp 542, 565 (S.D.N.Y. 1985); *Bialet v. Racal-Milgo, Inc.*, 545 F. Supp. 25, 31-32 (S.D.N.Y. 1982); *Blount v. Peerless Chemicals (P.R.) Inc.*, 216 F.Supp. 612, 615 (E.D.N.Y. 1962), *aff'd*, 316 F.2d 695 (2d Cir.), *cert. denied*, 375 U.S. 831 (1963). Quite to the contrary, there is no dispute that Teledyne and Teledyne Industries, although parent and subsidiary, are separate corporate entities and that they maintain separate operations, books, records, and bank accounts,⁴ and that Teledyne does not control the marketing and operational policies of Teledyne Industries. As such, the fact that Teledyne Industries is "doing business" in New York cannot be ascribed to Teledyne for purposes of § 301.

Jurisdiction under § 302(a)(3). Plaintiffs' argument that defendant is amenable to suit under the tortious act provision of the "long arm" statute, N.Y.C.P.L.R. 302(a)(3), is also without merit. Section 302(a)(3) provides in pertinent part that

[a]s to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent:

4 The fact that during the years 1986-1988, Teledyne, and all its subsidiaries and their divisions participated in a self-insurance program with respect to aircraft product liability claims, which program was administered by Teledyne is not sufficient standing alone to establish that Teledyne and Teledyne Industries were for practical purposes the same corporate entity.

(3) commits a tortious act without the state causing injury to person or property *within* the state. . . .

(emphasis added)

It is settled law in New York that to suffer in New York the residual effects of an injury sustained elsewhere is not synonymous with suffering an injury "within the state" for purposes of § 302(a)(3). This section

looks to the imparting of the original injury within the State of New York and not resultant damage. . . . To hold otherwise would open a veritable Pandora's box of litigation subjecting every conceivable prospective defendant involved in an accident with a New York domiciliary to defend actions brought against them in the State of New York.

Kramer v. Hotel Los Monteros S.A., 57 A.D.2d 756, 394 N.Y.S.2d 415, 416 (1st Dept. 1977) quoting *Black v. Oberle Rentals*, 55 Misc.2d 398, 400 (Sup.Ct. 1967).

See also *American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428, 434 (2d Cir. 1971); *Sanders v. Wiltemp Corp.*, 465 F.Supp. 71, 73 (S.D.N.Y. 1979).

In this case, the injury was not suffered in New York, but in North Carolina. Accordingly, § 302(a)(3) does not afford this court jurisdiction over the defendant.

Based on the foregoing discussion, this court finds that plaintiff has not sustained its burden of establishing personal jurisdiction over the defendant Teledyne.

In the usual course of such matters, this court would allow plaintiff an opportunity to file an amended complaint⁵ to name the proper defendant, that is, Teledyne Industries. Fed.R.Civ.P. 15(a). In this case, however, as is set forth more fully in section D, *infra*, the amended complaint against

⁵ At oral argument, plaintiff orally moved to amend its complaint and subsequently filed motion papers to that effect.

Teledyne Industries would be time barred. Fed.R.Civ.P. 15(c). *Schiavone v. Fortune*, 106 S.Ct. 2379 (1986).

B. Defendant's Motion to Dismiss: Statute of Limitations

The airplane crash in North Carolina occurred on November 26, 1986. Plaintiff filed this action on November 22, 1988. Under New York law, the statute of limitations for wrongful death actions is 2 years. N.Y.E.P.T.L. § 5.4-c. As such, plaintiff must have *commenced* this action no later than November 26, 1988.

In diversity cases, state law dictates when and how an action is "commenced" for purposes of tolling the statute of limitations. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Ragan v. Merchants Transfer & Warehouse*, 337 U.S. 530 (1949). Unlike practice in federal court, where an action is commenced upon the filing of the summons with the court, Fed.R.Civ.P. 3, in New York, an action is not commenced until the summons has been served upon the defendant. N.Y.C.P.L.R. § 304.

There is no dispute that plaintiff did not serve the defendant Teledyne with the summons prior to the expiration of the 2-year statute of limitations. The action was filed in this court on November 22, 1988. On December 1, 1988, plaintiff purported⁶ to serve defendant by mailing two copies of the summons and complaint to "TELEDYNE, INC., Continental Motors Division, Box 90, Mobile, Alabama 36601". Service was purportedly effected on December 5, 1988.

On these facts, it is clear that plaintiffs did not commence this lawsuit within the applicable statutory period. Plaintiffs contend, however, that the filing of the complaint with the clerk of this court triggered the provisions of N.Y.C.P.L.R. § 203(b)(5), which plaintiffs contend gave them an additional 60 days within which to effect service upon the defendant.

6 The issue of the propriety of service by mail upon a foreign corporation is discussed *infra*.

Section 203(b)(5)⁷ contains an extension period that tolls the statute of limitations for 60 days upon an appropriate filing with the county sheriff or clerk of the court if the action is commenced in New York County. Filing with the clerk of the federal district court has been deemed the equivalent of filing with the sheriff and allows the plaintiff to take advantage of the additional 60-day period. See *Florence v. Krauski*, 533 F.Supp. 1047, 1050-51 (W.D.N.Y. 1982); *Somas v. Great American Insurance Co.*, 501 F. Supp 96 (S.D.N.Y. 1980); *Zarcone v. Condie*, 62 F.R.D. 563 (S.D.N.Y. 74); *Nola Electric Co. v. Reilly*, 93 F. Supp. 164 (S.D.N.Y. 1948), *cert. denied sub nom. Reilly v. Goddard*, 340 U.S. 951 (1951).

In the usual course of a federal diversity action where the court's jurisdiction over the person of the defendant is properly based on the defendant's doing or transacting business in the state, this court has no doubt that § 203(b)(5) applies so long as one of the enumerated activities (residence, doing business, employment, etc.) occurred in one of the counties within the district. *Levy v. Pyramid Co. of Ithaca*, 687 F. Supp. 48, 50 (N.D.N.Y. 1988), *aff'd*, 871 F.2d 9 (2d Cir. 1989); *Gold v. Jeep Corp.*, 579 F.Supp. 256 (E.D.N.Y.

7 The pertinent provisions of § 203 provide that

(a) The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed.

(b) A claim asserted in the complaint is interposed against the defendant . . . when:

5. The summons is delivered to the sheriff of that county outside the city of New York or is filed with the clerk of that county within the city of New York in which the defendant resides, is employed or is doing business, or if none of the foregoing is known to the plaintiff after reasonable inquiry, then of the county in which the defendant is known to have last resided, been employed or been engaged in business, or in which the cause of action arose; or if the defendant is a corporation, of a county in which it may be served or in which the cause of action arose; provided that:

(i) the summons is served upon the defendant within sixty days after the period of limitation would have expired but for this provision. . . .

1984); *Aro v. Lichtig*, 537 F.Supp. 599 (E.D.N.Y. 1982); *Florence, supra*; *Somas, supra*.

As the court noted in *Levy*, however, this statute "has not been interpreted to allow plaintiffs the benefits thereunder unless the complaint is filed with the district court clerk located in the county where the defendant resides, is employed or is doing business, etc." *Levy*, 687 F.Supp. at 53. In this case, as in *Levy and Parkhurst v. First & Merchants Corp.*, 100 Misc.2d 69, 418 N.Y.S.2d 260 (Sup. Ct. N.Y. Co. 1979), *aff'd*, 78 A.D.2d 783 (1980), the defendant Teledyne, the only named defendant in this action, does not reside in New York, does not conduct or transact business in New York, and furthermore, the cause of action did not arise in New York. As such, plaintiffs are not entitled to the benefit of § 203(b)(5).

Even if this court had concluded that § 203(b)(5) applied, plaintiffs did not *properly* serve the defendant during the 60-day grace period. See § C, *infra*.

Accordingly, this court finds that plaintiffs did not timely commence this action and the complaint must be dismissed as time barred.

C. Defendant's Motion to Dismiss: Improper Service

Defendant moves to dismiss the complaint on the ground that service of process by mail was not proper. Although plaintiffs at one time seemed to contend that such service was proper, see affidavit of Arthur Wolk, filed May 17, 1989, para. 6, it would appear that plaintiffs now concede that such service was improper. Such a concession is proper in light of well settled law.

Plaintiffs apparently attempted to serve defendant by mail under the authority of Federal Rule of Civil Procedure 4(c)(2)(C)(ii). In diversity cases, the propriety of service of process by first-class mail upon a foreign corporation is subject to the general territorial restrictions of Rules 4(e) and (f). See Cong.Rec. H9855 (daily ed. Dec. 15, 1982), reprinted at

96 F.R.D. 81, 128. *See also*, *William B. May Co., Inc. v. Hyatt*, 98 F.R.D. 569, 570 (S.D.N.Y. 1983). Under Rules 4(e) and (f), mail service outside of the forum state is invalid unless out-of-state mail service is authorized by the law of the forum state. *Poulus v. Wilson*, 116 F.R.D. 326, 228 n.1 (D.Vt. 1987); *Grosser v. Commodity Exchange, Inc.*, 639 F.Supp. 1293, 1315-16 (S.D.N.Y. 1986); *Catalyst Energy Development Corp. v. Iron Mtn. Mines, Inc.*, 108 F.R.D. 427, 428 (S.D.N.Y. 1985); *William B. May*, 98 F.R.D. at 570.⁸ It is clear that plaintiff's mail service on defendant Teledyne was not authorized under New York law. N.Y.Bus. Corp.Law § 306; N.Y.C.P.L.R. §§ 311, 313. The only remaining question is, *if* Teledyne had actual notice of this lawsuit, whether that knowledge would operate as a waiver of or bar to the assertion of the defense of improper service under Rule 12(b). On this issue, the Second Circuit has spoken.

Absent a waiver, Rule 4 mandates that the defendant be served with the summons and complaint personally, or in accordance with one of the several prescribed alternatives. A showing that the defendant has had actual notice of the lawsuit is not sufficient to bar a motion to dismiss under Rule 12(b)(2).

Martin v. N.Y. State Dept. of Mental Hygiene, 588 F.2d 371, 373 (2d Cir. 1978).

In the absence of proper service, this court has no *in personam* jurisdiction over the defendant to adjudicate the claims asserted against it. This finding may appear to exalt

⁸ Plaintiff's reliance on *Morse v. Elmire Country Club*, 752 F.2d 35 (2d Cir. 1984) is misplaced. In *Morse* the court addressed the relationship between mail service under Rule 4(c)(2)(C)(ii) and the commencement of the action for purposes of tolling the New York statute of limitations. The court never discussed the propriety of extraterritorial service under 4(c)(2)(C)(ii) where state law does not authorize the same. *See Davis v. Musler*, 713 F.2d 907 (2d Cir. 1983) where the court held that Rule 4(d)(1), which prescribes the manner in which individuals shall be served, must be read in light of Rule 4(f) and "applies only when a complaint is served within the territorial limits of the state in which the district court where the action is pending sits."

form over substance, however, the Second Circuit insists that failure to comply with the basic terms for service of process deprives a court of jurisdiction.

The standards set in Rule 4 for service on individuals and corporations are to be liberally construed, to further the purpose of finding personal jurisdiction in cases in which the party has received actual notice. But there must be compliance with the terms of the rule, and absent waiver, incomplete or improper service will lead the court to dismiss the action unless it appear that proper service may still be obtained.

Grammenos v. Lemos, 457 F.2d 1067, 1070 (2d Cir. 1972).

Based on the foregoing discussion, this court finds that plaintiffs failed to properly serve the defendant. Accordingly, defendant's motion to dismiss under Rule 12(b)(2) is granted.

D. Plaintiffs' Motion to Amend the Complaint

As previously indicated, in the normal course, this court would freely grant plaintiff's motion to amend the complaint to name the proper defendant. Defendant Teledyne's opposition to this motion, based on the Supreme Court decision in *Schiavone v. Fortune*, 477 U.S. 21 (1986), would be more appropriately asserted by the newly named defendant, presumably Teledyne Industries, in a motion to dismiss. However, in light of the settled state of the law regarding the relation back doctrine of Rule 15(c), this court concludes that allowing plaintiff to amend its complaint only to have the new defendant, presumably represented by the same counsel as Teledyne, move to dismiss would be a futile gesture and a waste of the parties' and this court's resources. Thus, based on the discussion that follows, plaintiff's motion to amend is denied.

Rule 15(c) provides that

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the origi-

nal pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, *within the period provided by law for commencing the action* against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(emphasis added)

The Supreme Court decision in *Schiavone*, 477 U.S. 21 (1986) governs this case. See also, *In re Allbrand Appliance & Television Company, Inc.*, No. 88-5034, slip op. 3369 (May 17, 1989 2d Cir.). In *Schiavone*, the court held that the relation back rule of Rule 15(c) may be employed only upon satisfying four factors:

(1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for the mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Id., at 29.

In *Schiavone*, the Court dismissed the amended complaint because it found that Time, Inc., the party being brought in by amendment, received notice of the action only after the statute of limitations had expired, although Fortune Magazine, a division of Time, had been properly served prior to the expiration of the limitations period. Referring to the Advisory Committee's 1966 Note regarding Rule 15(c), in

which the Committee specifically stated that Rule 15(c)'s phrase "within the period provided by law for commencing the action" means "within the applicable limitations period", the Court aligned itself with various commentators who had accepted the literal meaning of the Rule and the Advisory Note. *Id.*, at 31 citing 3 J. Moore, Federal Practice, § 15.15[4.-2], p. 15-225 (2d ed. 1985) ("the Rule demands a showing that, within the period of limitations, the new party. . ."); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1498, p. 228 (Supp. 1985) ("in order for an amendment adding a party to relate back under Rule 15(c) the party to be added must have received notice of the action before the statute of limitations has run"). As the Court stated "[t]he linchpin [of relation back] is notice, and *notice within the limitations period.*" *Id.*, at 31 (emphasis added).

In this case, there is no need to discuss the first three requirements under 15(c) inasmuch as it is clear that neither Teledyne nor Teledyne Industries, the party presumably sought to be brought in by amendment, received notice of this lawsuit or were properly served with process within the applicable statute of limitations. See §§ B and C, *supra*. Accordingly, plaintiffs' motion to amend the complaint is denied.

This case is the stuff of nightmares. At every turn, plaintiffs are caught in a procedural Catch-22. But this mischief was caused in part and exacerbated by plaintiff's decision to begin the lawsuit with only four days remaining on the limitations "clock." Although the severity of the result would appear to exalt form over substance, this is a court of limited jurisdiction, which can exercise its power only if the plaintiff, in the first instance, invokes that power by properly commencing an action.

CONCLUSION

Based on the foregoing discussion it is hereby ORDERED that

(1) Defendant's motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction is hereby granted;

(2) Defendant's motion to dismiss under Rule 12(b)(6) for insufficiency of service of process is hereby granted;

(3) Defendant's motion to dismiss the complaint as time barred is hereby granted;

(4) Defendant's motion for summary judgment is denied as moot; and

(5) Plaintiffs' motion to amend the complaint is denied.

It is further ORDERED that plaintiffs' complaint be dismissed in its entirety.

IT IS SO ORDERED.

/s/

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
August 8, 1989.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
Civ. 88-1299L

MARJORIE DATSKOW, Executrix of the Estates of Robert C. Gross and Susan C. Gross, Deceased, and Administratrix of the Estates of Michael and David Gross, Deceased, 4105 Fields Drive, Lafayette Hill, Pennsylvania 19444,

and

GROSSAIR, INC., 840 Winona Boulevard,
Rochester, New York 14617,

Plaintiffs,

—v.—

TELEDYNE, INC., Continental Motors Division,
Box 90, Mobile, Alabama 36601

Defendant.

DECISION AND ORDER

On August 9, 1989, this Court entered a decision and order dismissing plaintiffs' complaint in its entirety based on this Court's lack of jurisdiction over the person of the named defendant, insufficiency of service of process, and on the basis of the statute of limitations.¹

On August 18, 1989, the plaintiffs filed a motion for reconsideration and reargument. Plaintiffs raised three argu-

1 To the extent that the decretal paragraph of the decision suggests that the entire complaint be dismissed as time-barred, it is incorrect. The Court's discussion of the statute of limitations and its conclusion in the body of the decision reflect that plaintiff Datskow's wrongful death cause of action was time-barred, not the other causes of action.

ments in support of their application for reconsideration and reargument. One, that plaintiff Datskow's survival cause of action and Grossair's property damage claim should not have been dismissed as time-barred. Two, that a review of the record reveals that the action was properly instituted against the correct defendant, albeit under the incorrect name, within the applicable time period. Three, that in any event, Teledyne Industries, Inc. does business in New York and is subject to jurisdiction under N.Y.C.P.L.R. § 301. Defendant has filed a memorandum of law in opposition to plaintiffs' motion. For the reasons that follow, plaintiffs' motion for reconsideration and reargument of this Court's decision and order dated August 8, 1989 is denied.

Plaintiffs in essence argue that this Court erred in dismissing the entire complaint as time-barred. As previously noted, *supra*, the decretal paragraph of the decision inadvertently dismissed the entire complaint as time-barred. It is clear from the Court's discussion within the body of the decision, that only the wrongful death action brought by plaintiff Datskow is time-barred. To that extent, the prior order is modified.

However, this oversight does not save plaintiffs. In the August 9th decision, this Court found that it lacked personal jurisdiction over the named defendant. This finding relates to the entire complaint, not merely the wrongful death action, and as such, the entire complaint was properly dismissed. Plaintiffs would have this Court allow it to amend the complaint with respect to the survival and property claims so as to name the proper defendant. However, this Court lacks any jurisdiction over this case as it stands now. Furthermore, plaintiffs have yet to properly effect service on either the named defendant, Teledyne, Inc., or the party it seeks to add, Teledyne Industries, Inc.

Plaintiffs' only recourse at this point is to commence a new action against Teledyne Industries, Inc. based on the survival and property claims set forth in the complaint of this action. Neither of these claims is time-barred at this point, and,

assuming proper service upon the proper defendant, plaintiffs' cause of action may proceed in this court.

CONCLUSION

Accordingly, plaintiffs' motion for reconsideration and reargument is denied. The decretal paragraph in the Decision of August 9, 1989 is modified and the reference to the entire complaint being dismissed as time-barred is stricken.

IT IS SO ORDERED.

/s/

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
September 7, 1989.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CASE NUMBER: Civ-88-1299

MARJORIE DATSKOW, Executrix of the Estates of Robert C. Gross and Susan C. Gross, Deceased, and Administratrix of the Estates of Michael and David Gross, Deceased, and GROSSAIR, INC.

—v.—

TELEDYNE, INC.

SUMMONS IN A CIVIL ACTION

TO: TELEDYNE, INC.
Continental Motors Division
Box 90
Mobile, Alabama 36601

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY:

Wolk and Genter
1710-12 Locust St.
Philadelphia, PA 19103

Of Counsel
DAVIDSON, FINK, COOK
& GATES
900 First Federal Plaza
Rochester, NY 14614

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK:
Michael J. Kaplan

DATE:
November 22, 1988

By DEPUTY CLERK:
Margaret Ghysel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
CIVIL ACTION CIV-88-1299

MARJORIE DATSKOW, Executrix of the Estates of Robert C. Gross and Susan C. Gross, Deceased, and Administratrix of the Estates of Michael and David Gross, Deceased, 4105 Fields Drive, Lafayette Hill, Pennsylvania 19444,

and

GROSSAIR, INC., 840 Winona Boulevard,
Rochester, New York 14617,

vs.

TELEDYNE, INC., Continental Motors Division,
Box 90, Mobile, Alabama 36601

JURY TRIAL DEMANDED

1. Plaintiff, Marjorie Datskow, is an individual residing in Lafayette Hill, Pennsylvania, a citizen of the Commonwealth of Pennsylvania, and is the Executrix of the Estates of Robert C. and Susan C. Gross, deceased, having been appointed by the State of New York Surrogate's Court, County of Monroe on December 17, 1986, and the Administratrix of the Estates of Michael and David Gross, having been appointed so by the State of New York Surrogate's Court, County of Monroe on January 6, 1987.

2. Plaintiff, Grossair, Inc., is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business at 840 Winona Boulevard, Rochester, New York, and at all times material hereto was

the owner of a Beechcraft Debonair single engine aircraft Registration No. N9592Y.

3. Defendant, Teledyne, Inc., is a corporation believed to be organized and existing under the laws of the State of Delaware. Its principal place of business at Box 90, Mobile, Alabama, and at all times material hereto is in the business of manufacturing aircraft powerplants.

4. Jurisdiction of the within Court is invoked pursuant to 28 U.S.C. § 1332, diversity of citizenship between the parties and the amount in controversy is claimed in excess of Ten Thousand Dollars (\$10,000.00), exclusive of interest of costs.

5. On November 26, 1986, the Plaintiff's decedent Robert C. Gross and his wife Susan C. Gross, with their children David and Michael Gross as passengers, were in a Beechcraft Debonair single engine aircraft on approach to the Winston-Salem, North Carolina airport.

6. As the aircraft neared the airport, the engine, manufactured by the Defendant, failed, causing the airplane to crash into hostile terrain, resulting in the loss of life of all aboard.

7. The cause of the accident was solely as a result of defective and dangerous manufacture of the aircraft engine and its accessories by the Defendant as more particularly hereinafter set forth.

8. This action is brought under the Wrongful Death and Survival Statutes of the State of New York in behalf of the following beneficiaries:

Marjorie Datskow—sister of Robert C. Gross

Juletta Mabelle Cook—mother of Susan C. Gross

9. Plaintiff's claims under the aforesaid include, but are not necessarily limited to, the severe personal, physical and emotional injuries, both internally and externally, suffered as the decedents, resulting in their death on November 26, 1986, severe pain, shock, terror and the acknowledged and conscious awareness of impending certain death by mutilation,

which caused them to undergo great mental anguish prior to their deaths, various losses suffered by the beneficiaries under the aforesaid Acts, including but without limitation to, funeral expenses, loss of care, comfort, services, earnings, assistance, aid, counseling, advise, guidance, love and affection, and all claims cognizable for the deaths of the decedents, together with such administration, medical, hospitalization and other expenses suffered as a result of the deaths of the decedents.

Background

10. In May, 1985, the aircraft owned by Grossair, Inc., of which the Plaintiff's decedent Robert C. Gross was sole owner, had its engine replaced with one manufactured by the Defendant.

11. At all times subsequent to the installation of that engine, it proved to be unreasonably dangerous and defective in that following its installation, its fuel pump failed and oil analysis demonstrated that the engine was not breaking in and deteriorating.

12. At all times material hereto, the Plaintiff's decedent Robert C. Gross did bring to the attention of the Defendant the ongoing problems with the new engine, and notwithstanding those notifications the Defendant did constantly reassure the Plaintiff's decedent that the engine was safe and satisfactory for flight.

13. Relying on the representations of the Defendant, the Plaintiff's decedent did continue to operate the aircraft with the new engine until November 26, 1986, when as the aircraft being operated by the Plaintiff's decedent Robert C. Gross and which his wife Susan C. Gross and their two young children, Michael Gross and David Gross were passengers approached the Winston-Salem, North Carolina airport, the engine failed or lost power in such a manner so as to cause the aircraft to crash into hazardous and hostile terrain, resulting in the aircraft catching fire and all those aboard

being burned alive, as well as suffering horrendous, painful and otherwise fatal injuries.

14. Long prior to November 26, 1986, the Defendant knew of the unreasonably dangerous engine problem with the engine sold to the Plaintiff's decedent, installed in the aircraft owned by Grossair, Inc., and knew that unless immediate corrections were made in the engine, it would or could fail resulting in serious injury or death.

15. Notwithstanding the foregoing information and actual notice that the engine was exhibiting signs of failure, the Defendant failed to replace the engine so as to prevent the inevitable loss of life.

Theories of Liability

COUNT I—NEGLIGENCE

16. Plaintiff incorporates by reference paragraphs 1 through 15.

17. Defendant, knowing the ultimate usage of the aircraft and engine being used by the Plaintiff's decedents, knowing that the said engine would become inherently dangerous if negligently or improperly designed, manufactured, inspected, tested or supported subsequent to its initial delivery, had a duty to the Plaintiff's decedents to design, manufacture, assemble, inspect, test and support the engine in order to render the aircraft in which it would be installed suitable for the ordinary purposes of that use.

18. This Defendant, knowing the ultimate usage of the aircraft and engine, and knowing that said aircraft and engine was or would become inherently dangerous if negligently or improperly designed, manufactured, tested, inspected and supported, had a duty to author, publish, instruct and educate owners, operators, mechanics, inspection personnel and others who would be performing maintenance on the aircraft as to the proper inspections, procedures and tests that should be followed for purposes of ascertaining the existence of dan-

gerous defects that would result in the extreme likelihood of serious personal injury and death.

19. This Defendant had a further duty to warn owners, operators and mechanics associated with the aircraft and engine of any defect, service problem or malfunction which had occurred or would likely occur in the normal life of the product so as to prevent unjustified reliance on the reliability and safety of the product.

20. The accident subject to this Complaint was due to the negligence of this Defendant, both generally and in the following respects:

a. Failing to properly design, manufacture, inspect, test and support the aircraft engine involved in this accident;

b. Failing to properly design, manufacture, inspect and test the fuel system, fuel pumps, fuel injectors, fuel injector servo and other accessories of the engine;

c. Failing to properly author, publish, instruct, educate and otherwise warn the Plaintiff's decedent Robert C. Gross or anyone else associated with this engine of:

(1) The proper procedures to be used in the performance of maintenance on the engine;

(2) The proper diagnostic procedures to be used in ascertaining problems with the engine;

(3) The proper procedures to be used for testing the said aircraft;

(4) The proper procedures to be used to avoid inadvertent, unexpected and unanticipatable engine failure, partial engine failure or loss of power;

(5) The proper procedures to be used upon experiencing unexpected, inadvertent and unanticipatable complete or partial engine failure;

e. Failing to properly provide quality control and/or supervision during design and manufacture of the aircraft engine;

f. Failing to review available government and private publications reporting defects in the systems above described and prescribing changes or means by which accidents could be avoided as a result of these failures;

g. Violating or failing to comply with applicable Federal Aviation Administration Regulations pertaining to design, manufacture, maintenance and recall of aircraft engines which have been subject to such failures;

h. Negligence at law;

i. Other acts or omissions constituting negligence, as may be ascertained upon completion of discovery.

WHEREFORE, Plaintiff prays for judgment against the Defendant in an amount in excess of Ten Thousand Dollars (\$10,000.00).

COUNT II—STRICT LIABILITY IN TORT

21. Plaintiff incorporates by reference paragraphs 1 through 20.

22. Defendant is engaged in the design, manufacture, testing, inspection and sale of general aviation aircraft engines, including the IO-470K subject matter of this accident.

23. The engine subject of this lawsuit was in substantially the same condition at the time of the accident as when it left the control of the Defendant.

24. This aircraft had been maintained in strict accordance with the instructions of the Defendant in connection with the maintenance of the aircraft.

25. This aircraft was flown in strict accordance with the instructions of the Defendant in connection with its operation.

26. The accident resulted from defects in the aircraft and engine to include the fuel system, fuel control, fuel injector, fuel distribution system and fuel pump.

27. The Plaintiff's decedent had no knowledge of any defects or reason to suspect a defective condition in the aircraft, which would result in an engine failure or partial engine failure.

28. The Plaintiff's decedent relied on the representations made by the Defendant in connection with the suitability and continued suitability of the engine for use as an aircraft powerplant.

29. As a result of these defects, which were the cause of the deaths of the Plaintiff's decedents, the Defendant is strictly liable under the theory and law of the Restatement of Torts (Second) § 402A.

WHEREFORE, Plaintiff prays for judgment against the Defendant in an amount in excess of Ten Thousand Dollars (\$10,000.00).

COUNT III—BREACH OF WARRANTY

30. Plaintiff incorporates by reference paragraphs 1 through 29.

31. There arose from the sale of the Plaintiff's decedent's aircraft engine certain express and implied warranties that the aircraft engine was safe for use by the Plaintiff's decedent and other users and operators of the aircraft.

32. These implied warranties were of fitness for a particular purpose and merchantability regarding the use of said aircraft engine by the Plaintiff's decedent and other users or operators of the aircraft.

33. The Plaintiff's decedent Robert C. Gross relied upon such warranties in operating the aircraft on the day of the accident, as well as such warranties that were made from time to time by the Defendant following the installation of the said aircraft engine.

34. The said warranties of merchantability and fitness for a particular purpose were breached by the Defendant in that:

a. Defendant, a merchant in the goods of the type purchased by Plaintiff, did not have the same adequately designed and manufactured;

b. Said goods were not of fair an average quality in the trade in which the Defendant is engaged;

c. Said goods were not fit for the ordinary purposes for which the goods are used;

d. Said goods are not in conformity with, insofar as safety is concerned, those generally used in the trade or business in which Defendant is engaged;

e. Defendant knew, or should have known, that the engine and engine system was not adequate; and

f. Defendant knew, or should have known, that the engine and engine system were inadequate for the purposes intended and were dangerous for use.

35. The said warranties were breached by the Defendant, causing the Plaintiff's decedent to experience loss of power in the aircraft and crash, causing the Plaintiff's decedents' subsequent demise.

WHEREFORE, Plaintiff prays for judgment against the Defendant in an amount in excess of Ten Thousand Dollars (\$10,000.00).

COUNT IV—WILLFUL OR WANTON GROSS
NEGLIGENCE AND FRAUD

36. Plaintiff incorporates by reference paragraphs 1 through 35.

37. At all times material hereto and long prior to November 26, 1986, this Defendant knew that the Plaintiff's decedent Robert C. Gross was experiencing and reporting to this Defendant problems in the newly installed aircraft engine. These problems which were made known to the Defendant included oil consumption and oil analysis that demonstrated the engine was not breaking in properly.

38. In addition to the aforesaid information provided to the Defendant, the Defendant knew that it was experiencing product difficulties with engine driven fuel pumps such that accurate, reliable, properly metered and consistent fuel flows could not under all conditions of engine operation be counted upon.

39. The Defendant knew at all times material hereto and prior to November 26, 1986 that others had experienced failures of engine driven fuel pumps and fuel system failures in this model engine such that it was a possibility that the Plaintiff's decedent could likewise experience sudden engine failure or loss of power as a result of the same defects.

40. Notwithstanding the actual knowledge and the circumstances given rise to the risk of partial or complete engine failure reported privately in the government press and directly to the Defendant in this instance in an effort to cause the Defendant to make such changes or issue such warnings as were necessary to prevent such events from occurring in the future, the Defendant encouraged, recommended, suggested, and urged continued use of and reliance on its defective engine, and indeed provided no warnings to the Plaintiff's decedent Robert C. Gross with respect to the extreme likeli-

hood of serious bodily injury or death as a result of the Defendant failing to take such steps as were reasonably necessary to render the product non-defective.

41. Notwithstanding the actual knowledge of this Defendant that certain incidents, accidents or circumstances that would give rise to same had occurred, would occur and were likely to occur resulting in serious personal injury or death, the Defendant failed to take those steps that any manufacturer should take in an effort to reduce or eliminate the risk associated with the facts and circumstances about which it became aware, such failure constituting wanton, willful and utter and reckless disregard for the great likelihood of serious personal injury and death.

42. As a result of this conduct on the part of this Defendant, the Plaintiff prays for punitive damages.

WHEREFORE, Plaintiff prays for judgment against the Defendant in an amount in excess of Ten Thousand Dollars (\$10,000.00), and for punitive damages in an amount to be determined at trial.

COUNT V

GROSSAIR, INC. v. DEFENDANT

43. Plaintiffs incorporate by reference paragraphs 1 through 42.

44. At all times material hereto, Plaintiff Grossair was the owner of the aircraft involved in the accident referred in this Complaint and, as a result of that accident, its aircraft was totally destroyed.

45. The total loss of Plaintiff's aircraft was as a result of Defendant's negligence, breach of warranty and conduct giving rise to strict liability as more particularly described above and incorporated herein, as a result of which Plaintiff Grossair seeks reimbursement and damages.

WHEREFORE, Plaintiff prays for judgment against the Defendant in an amount in excess of Ten Thousand Dollars (\$10,000.00).

Arthur Alan Wolk, Esquire
WOLK AND GENTER
1712 Locust Street
Philadelphia, PA 19103
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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
Civil Action No. Civ-88-1299

MARJORIE DATSKOW, Executrix of the Estates of Robert C. Gross and Susan C. Gross, Deceased, and Administratrix of the Estates of Michael and David Gross, Deceased, 4105 Fields Drive, Lafayette Hill Pennsylvania 19444

—and—

GROSSAIR, INC., 840 Winona Blvd.,
Rochester, NY 14617

vs.

TELEDYNE, INC., Continental Motors Division,
Box 90, Mobile, Alabama 36601

ANSWER OF TELEDYNE, INC. TO COMPLAINT

Defendant TELEDYNE, INC. ("TELEDYNE"), by its attorneys Condon & Forsyth and Mackey & DiMarco, answers the Complaint of plaintiffs MARJORIE DATSKOW, Executrix of the Estates of Robert C. Gross and Susan C. Gross and Administratrix of the Estates of Michael and David Gross, and GROSSAIR, INC. as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1 and 2 of the Complaint.
2. Denies each and every allegation contained in Paragraph 3 of the complaint, except admits that defendant TELEDYNE is a corporation organized pursuant to the laws of the State

of Delaware with its principal place of business in the State of California.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 4 and 5 of the Complaint.

4. Denies each and every allegation contained in Paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the Complaint.

AS TO THE FIRST ALLEGED COUNT I—NEGLIGENCE

5. Answering Paragraph 16 of Count I of the Complaint, Defendant TELEDYNE repeats, reiterates and realleges each and every admission and denial contained in its answers to Paragraphs 1 through 15 of the Complaint with the same force and effect as if herein set forth in full.

6. Denies each and every allegation contained in Paragraphs 17, 18, 19 and 20, including subparagraphs (a) through (i), inclusive, of Count I of the Complaint.

AS TO THE ALLEGED COUNT II—STRICT LIABILITY IN TORT

7. Answering Paragraph 21 of Count II of the Complaint, Defendant TELEDYNE repeats, reiterates and realleges each and every admission and denial contained in its answers to Paragraphs 1 through 20 with the same force and effect as if herein set forth in full.

8. Denies each and every allegation contained in Paragraphs 22, 23, 24, 25, 26, 27, 28 and 29 of Count II of the complaint.

AS TO THE ALLEGED COUNT III— BREACH OF WARRANTY

9. Answering Paragraph 30 of Count III of Complaint, Defendant TELEDYNE repeats, reiterates and realleges each

and every admission and denial contained in its answers to Paragraphs 1 through 29 with the same force and effect as if herein set forth in full.

10. Denies each and every allegation contained in Paragraphs 31, 32, 33, 34, including subparagraphs (a) through (f), inclusive, and Paragraph 35 of Count III of the Complaint.

AS TO THE ALLEGED COUNT IV—WILLFUL OR WANTON GROSS NEGLIGENCE AND FRAUD

11. Answering Paragraph 36 of Count IV of the Complaint, Defendant TELEDYNE repeats, reiterates and realleges each and every admission and denial contained in its answers to Paragraphs 1 through 35 of the Complaint with the same force and effect as if herein set forth in full.

12. Denies each and every allegation contained in Paragraphs 37, 38, 39, 40, 41 and 42 of Count IV of the Complaint.

AS TO THE ALLEGED COUNT V

13. Answering Paragraph 43 of Count V of the Complaint, Defendant TELEDYNE repeats, reiterates and realleges each and every admission and denial contained in its answers to Paragraphs 1 through 42 with the same force and effect as if herein set forth in full.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 44 of Count V of the Complaint.

15. Denies each and every allegation contained in Paragraph 45 of Count V of the Complaint.

FIRST AFFIRMATIVE DEFENSE

16. The Complaint fails to state a claim against defendant TELEDYNE upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

17. The accident referred to in the Complaint resulted from the fault, negligence, want of care, defect, gross negligence, misuse, breach of warranty or other acts or omission of persons other than TELEDYNE and outside the control of TELEDYNE, for whose acts or omissions TELEDYNE is not responsible, and not as a result of any fault, negligence, want of care, defects, gross negligence, misuse, breach of warranty or other acts or omissions on the part of TELEDYNE.

THIRD AFFIRMATIVE DEFENSE

18. The engine on the subject aircraft was not used by Robert C. Gross and Susan C. Gross and/or other persons or entities other than TELEDYNE and outside the control of TELEDYNE in accordance with instructions, was altered, changed or modified from the condition in which it was originally delivered prior to November 26, 1986 or was subjected to abuse, misuse, improper repair, or was otherwise damaged or abused by persons other than TELEDYNE or by persons outside the control of TELEDYNE, for whose acts or omissions TELEDYNE is not responsible, and not as a result of any breach of warranty, manufacturing or design defect, negligence, gross negligence, fault or want of care on the part of TELEDYNE.

FOURTH AFFIRMATIVE DEFENSE

19. No act or omission on the part of TELEDYNE was a proximate cause of the injuries and damages alleged in the Complaint resulting from the accident of November 26, 1986.

FIFTH AFFIRMATIVE DEFENSE

20. TELEDYNE specifically denies that any negligence on its part contributed to or was a proximate cause of any injuries or damages sustained by the plaintiffs, but, in the event it is found that TELEDYNE was negligent in any manner or to any degree, TELEDYNE alleges, upon information and belief that other parties hereto and persons or entities not named in this action were negligent to a certain degree for the injuries or damages sustained by plaintiffs and therefore TELEDYNE contends that in the event there is found to be fault on the part of TELEDYNE which in any manner or degree contributed to the injuries of the plaintiffs, that a finding should be made apportioning and fixing the comparative fault of any or all parties or persons whether named to this action or otherwise.

SIXTH AFFIRMATIVE DEFENSE

21. At the time that the engine for the subject aircraft was sold, the engine was properly certified by the Federal Aviation Administration, met and exceeded all applicable Federal Aviation Regulations, incorporated state of the art technology and practices and met all warranties, if any, with respect to the engine.

SEVENTH AFFIRMATIVE DEFENSE

22. If any damages, judgment or other awards are recovered by plaintiffs against TELEDYNE for the accident, injuries, damages and losses alleged in plaintiffs' Complaint, such accident, injuries, damages and losses were directly and proximately contributed to and caused by persons or entities other than TELEDYNE and it is entitled to indemnity and contribution, or both, from each of said other persons or entities in an amount in direct proportion to the culpable conduct of said other persons or entities.

EIGHTH AFFIRMATIVE DEFENSE

23. Plaintiffs failed to give notice of the alleged defects in the subject engine to defendant TELEDYNE within a reasonable time after said alleged defects were discovered or should have been discovered.

NINTH AFFIRMATIVE DEFENSE

24. Plaintiffs' alleged injuries or damages, if any, were proximately caused by the sole negligence, assumption of risk or other culpable conduct on the part of Robert C. Gross and Susan C. Gross whose sole negligence, assumption of risk or other culpable conduct bars plaintiffs' recovery.

TENTH AFFIRMATIVE DEFENSE

25. Plaintiffs' causes of action are barred by the applicable statutes of limitation.

ELEVENTH AFFIRMATIVE DEFENSE

26. TELEDYNE had not been properly served with process in the within action.

TWELFTH AFFIRMATIVE DEFENSE

27. The written contract for sale of the subject engine, limits, disclaims and waives all claims and damages arising from alleged defects in the engine.

THIRTEENTH AFFIRMATIVE DEFENSE

28. Plaintiffs are barred from maintaining an action for breach of warranty because there is no privity of contract between TELEDYNE and plaintiffs.

FOURTEENTH AFFIRMATIVE DEFENSE

29. Plaintiff MARJORIE DATSKOW lacks the capacity to bring this action.

FIFTEENTH AFFIRMATIVE DEFENSE

30. The Court lacks jurisdiction over the person of defendant TELEDYNE.

WHEREFORE, defendant TELEDYNE, INC. respectfully requests that the Court dismiss the Complaint of plaintiffs MARJORIE DATSKOW and GROSSAIR, INC. with prejudice, together with costs, disbursements and other further relief as to which the Court deems proper in the premises.

Dated: New York, New York
December 22, 1988

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
Civ. 88-1299L

MARJORIE DATSKOW,

Plaintiff,

—v.—

TELEDYNE, INC.,

Defendant.

SCHEDULING ORDER

By order of Judge Larimer, dated December 27, 1988 this matter has been referred to the Magistrate for pre-trial proceedings pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 16(a).

Fed. R. Civ. P. 16(b) provides that in entering a scheduling order, the Court shall consult with attorneys for the parties and with any unrepresented parties by conference, telephone, mail, or other suitable means. In accordance with Fed. R. Civ. P. 16(b) and Local Rule 16(b), a preliminary pre-trial conference was held before the Magistrate on January 17, 1989 at which time the parties were represented and agreed upon the following discovery schedule. In accordance with Local Rule 16(b) this scheduling order is hereby issued. As set forth in Local Rule 16(b), "[n]o further or additional discovery, or joinder or third party practice shall be permitted thereafter except by leave of the Magistrate or the Court for good cause shown." This document shall govern all further proceedings in this matter.

Subject Matter Jurisdiction: Diversity/Wrongful Death

Jury Trial: Demanded

Deadline for Joinder of Other Parties and Amendment of the Pleadings: 30 days from the date of this Order

Deadline to Complete Discovery: July 14, 1989

Deadline for Expert Discovery: The plaintiff shall identify experts and provide Rule 26(b)(4)(A)(i) information by June 1, 1989. The defendant shall identify experts and provide Rule 26(b)(4)(A)(i) information by June 1, 1989. Rule 26(b)(4)(A)(i) materials shall comply with *Williams v. McNamara*, 118 F.R.D. 294, 296-97 (D. Mass. 1988), and shall fully alert opposing counsel to the substance of the expected testimony. See *Guilds v. A.R. Garza, M.D.*, ____ F. Supp. ____ (slip opn. at 3-10) (Civ. 86-329T, October 25, 1988) (reprinted in *The Daily Record*, No. 212, November 3, 1988, second section, p.1) (admission of previously undisclosed opinion required granting a new trial). Additional discovery of experts has been agreed to by the parties and shall be completed by August 1, 1989.

Deadline for Filing of All Motions Including Those Pursuant to Fed. R. Civ. P. 12 and 56, with Supporting Memoranda: August 31, 1989

Trial Date Status Conference before Judge Larimer: August 17, 1989 at 4:00 p.m.

Trial Date: The matter shall be ready for trial as soon after August 1, 1989 as the Court's calendar permits.

The parties' attention is invited to Local Rule 17 which encourages the cooperation of counsel. It provides that "no motion for discovery and production of documents under Rules 26 through 37 of the Federal Rules of Civil Procedure shall be heard unless moving counsel notifies the court by written affidavit that sincere attempts to resolve the discovery dispute have been made[,] . . . detail[ing] the times and places of the parties' meetings, correspondence or discussions concerning the discovery dispute, and the names of all parties participating therein." As a general matter, an exchange of correspondence is not sufficient without an earnest effort at resolution by personal or electronic contact between counsel.

Informal resolution of discovery disputes by conference call to the Magistrate is encouraged to avoid a waste of judicial resources and attorney time.

SO ORDERED.

KENNETH R. FISHER
United States Magistrate

Dated: Rochester, New York
January 18, 1989

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

. . .

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion. . . .

. . .

(h) Waiver or Prevention of Certain Defenses.

(1) A defense of lack of jurisdiction over a person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

. . .

Fed. R. Civ. P. 12(b), (h).

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

. . .

(c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

. . .

Fed. R. Civ. P. 15(a), (c).



(2)
No. 90-199

Supreme Court, U.S.

FILED

AUG 31 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

TELEDYNE, INC.,

Petitioner,

v.

MARJORIE DATSKOW, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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BEST AVAILABLE COPY

QUESTION PRESENTED

Has the petitioner advanced any special or important reason warranting review of this case?

The respondents respectfully answer and argue "No".

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No. 90-199

In The
Supreme Court of the United States
October Term, 1990

TELEDYNE, INC.,

Petitioner,

v.

MARJORIE DATSKOW, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Respondents, Marjorie Datskow and Grossair, Inc., respectfully request that the Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 899 F.2d 1298 (2d Cir. 1990). It is reprinted in the Appendix attached to the

Petition. (App. 4a-16a). The *per curiam* opinion of the Court of Appeals on petition for rehearing is unofficially reported at 1990 U.S. App. LEXIS 4535 (2d Cir. May 2, 1990). It is reprinted in the Appendix attached to the Petition. (App. 1a-3a).

The decision and order of the district court granting petitioner's motion to dismiss for lack of personal jurisdiction, improper service, and statute of limitations, and denying respondents' motion for leave to amend the complaint to correct the name of the defendant is reprinted in the Appendix, (App. 17a-31a), as is the decision and order of the district court denying respondents' motion for reconsideration. (App. 32a-34a). Neither of the district court's opinions have been reported.

JURISDICTION

The jurisdiction of the district court was invoked originally under 28 U.S.C. § 1332 (1983), due to the diversity of citizenship of the parties, the amount in controversy being certified in excess of \$10,000, the jurisdictional amount in effect at the time the action was commenced, exclusive of interest and costs.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1983).

STATEMENT OF THE CASE

On November 22, 1988, Marjorie Datskow and Grossair, Inc.¹ filed a complaint in the United States District Court for the Western District of New York at Rochester. The complaint alleged that on November 26, 1986, a Beechcraft Debonair single-engine aircraft suffered engine failure and crashed while on approach to an airport in Winston-Salem, North Carolina, killing all persons on board the plane. The dead included Robert C. Gross, his wife, Susan, and their two small children, Michael and David. The plane, which was owned by Grossair, Inc., was destroyed in the post-impact fire.

The aircraft engine was manufactured and remanufactured by Teledyne Continental Motors Aircraft Products, a Division of Teledyne Industries, Inc. (TCM), which maintains an aircraft manufacturing plant in Mobile, Alabama. Teledyne Industries, Inc. is a wholly owned subsidiary of Teledyne, Inc., a holding company with thirty-nine subsidiaries, most of which use the word "Teledyne" in their corporate names. The mailing address for TCM is Box 90, Mobile, Alabama 36601. Suit was brought against the engine manufacturer by Marjorie Datskow (Datskow), a citizen of Pennsylvania, as executrix and administratrix of the decedents' estates, and by Grossair, Inc. (Grossair). The defendant was identified in the caption and body of the complaint as "Teledyne, Inc.,

¹ Grossair, Inc. was a stock corporation formerly organized and existing under the laws of the Commonwealth of Virginia. Its corporate existence was terminated on September 1, 1987.

Continental Products Division" located at "Box 90, Mobile, Alabama 36601."

The complaint alleged causes of action for negligence, strict product liability, fraud, and breach of warranty. Datskow made claims under New York's wrongful death and survival statutes, and Grossair sought to recover for the total loss of the aircraft. The limitations period for a property damage action and for a survival action is three years under New York law, N.Y. Civ. Prac. Law & R. § 214 (McKinney 1990), whereas a wrongful death action must be commenced within two years. N.Y. Est. Powers & Trusts Law § 5-4.1(1) (McKinney Supp. 1990). Under New York law, service of the summons, not filing of the complaint, is the means by which an action is commenced and the statute of limitations tolled. N.Y. Civ. Prac. Law & Rule § 304 (McKinney 1990). In addition, New York law extends the normal statute of limitations for sixty days under certain circumstances. N.Y. Civ. Prac. Law & R. § 203(b)(5) (McKinney 1990).

On December 1, 1988, Datskow and Grossair mailed a copy of the complaint and summons to the defendant, as identified in the caption, by certified mail, return receipt requested, and by first class mail. A receipt was returned, acknowledging receipt of the summons and complaint on December 5, 1988 in Mobile, Alabama. On December 23, 1988, Teledyne filed an answer raising fifteen affirmative defenses, including lack of personal jurisdiction, lack of proper service, and expiration of the applicable statutes of limitations. On January 17, 1989, counsel for the parties attended a Rule 16 scheduling conference before a United States magistrate, at which time the scheduling of discovery and motions, as well as the possibility of settlement,

were discussed and a scheduling order entered. No mention was made at the conference that TCM was in fact a division of Teledyne Industries, Inc., rather than Teledyne, Inc. as named in the complaint, that either corporation had not been properly served with the complaint, that there was a colorable claim that any of the causes of action were barred by the applicable statutes of limitations, or that defense counsel had any intention of filing a dispositive motion on any of these issues. Defense counsel also did not alert the court at the conference of the jurisdictional defect due to the claimed improper service of process.

On April 21, 1989, Teledyne moved for summary judgment and to dismiss on the grounds of lack of personal jurisdiction, lack of proper service, and statute of limitations, claiming that Datskow had sued the wrong defendant and that the entire action was time-barred by the two year wrongful death statute of limitations. Teledyne conceded that the aircraft engine was manufactured and remanufactured by TCM, but claimed that this entity had not been sued. On May 22, 1989, Datskow and Grossair moved for leave to amend the complaint to change the identification of the defendant to "Teledyne Continental Motors Aircraft Products, a Division of Teledyne Industries, Inc."

On August 9, 1989, without holding an evidentiary hearing, the district court granted Teledyne's motion to dismiss and denied the cross-motion based on the premise that the wrong corporation, the holding company, Teledyne, Inc., rather than Teledyne Industries, Inc., had been sued. The district court then found that Teledyne, Inc. was not amenable to the personal jurisdiction of the

court, ruled that service of process was improper because mail service is ineffective beyond the territorial limits of the state in which the district court sits absent a state law provision providing for extraterritorial mail service, and held that the entire action was time-barred. (App. 22a-28a). The district court also concluded that the sixty day tolling provision of section 203(b)(5) of the New York Civil Practice Law and Rules did not apply because Teledyne, Inc. does not reside in New York or do business in that state. (App. 26a). The district court then dismissed the entire complaint as time-barred, and judgment was entered in favor of Teledyne.

Datskow and Grossair filed a motion for reconsideration, pointing out that the statute of limitations for the survival action and property damage action had not yet run, and requested that the district court reconsider its dismissal of the entire action. Although the district court recognized that the entire action was not time-barred, it denied the motion for reconsideration and directed Datskow and Grossair to commence a second lawsuit, and to re-serve the defendant with process. (App. 32a-34a). Datskow and Grossair filed a timely notice of appeal.

On March 23, 1990, a unanimous panel of the Court of Appeals for the Second Circuit reversed and remanded for further proceedings, "including allowing plaintiffs to amend the complaint to designate properly the name of the defendant, Teledyne Industries, Inc." (App. 16a). Based on undisputed facts of record, the Court of Appeals held, in a nutshell, that the correct party – the engine manufacturer, an unincorporated division of Teledyne Industries – had been sued, and that the summons

and complaint had been served by mail at its manufacturing plant in Mobile, Alabama. The Second Circuit thus determined, based upon its application of state law, that the correct defendant had received actual notice of the lawsuit within the limitations period provided by New York law.

In its opinion, the Second Circuit observed that "the line between naming the wrong defendant and mislabeling the right one must be drawn in the context of the nomenclature created by the defendant and the labeling undertaken by plaintiffs assessed against that context" (App. 9a). After listing the various ways that the defendant was identified in the complaint, the Court of Appeals held that the "plaintiffs' complaint sufficiently alerted Teledyne Industries, Inc. that it was the corporation being sued so this case may be characterized as one of mislabeling." (App. 10a). The Second Circuit, noting that the parties did not dispute that Teledyne Industries, the parent company of TCM, was authorized to do business in New York, also concluded that personal jurisdiction was proper. (App. 10a).

The Second Circuit next considered the issue of service of process, holding that the territorial limits of Rule 4(f) apply to Rule 4(c) mail service. (App. 11a). The Second Circuit noted that, at the time the summons and complaint were sent by mail to TCM, New York law did not permit mail service upon corporations,² yet concluded that even though plaintiffs' mail service was not

² New York now permits mail service on domestic and foreign corporations. See N.Y. Civ. Prac. Law & R. § 312-a (McKinney 1990).

proper under Rule 4, "under all the circumstances, . . . defendant's conduct bars it from complaining about the defective form of service." (App. 12a). In particular, the Court of Appeals stressed that the "amenability of Teledyne Industries, Inc. to the jurisdiction of the Western District is clear, and defendant is complaining about a defect in the form of service, one that could have been readily cured during the limitations period if defendant had promptly complained." (App. 12a).

Finally, the Second Circuit determined that Datskow's wrongful death claims were not time-barred. The Court of Appeals recognized that "[s]ervice of process must be timely made when a state statute of limitations specifies that service is necessary to toll a limitations period, *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), but federal law may determine when service has been made, *Hanna v. Plumer*, 380 U.S. 460 (1965)." (App. 13a-14a). The Second Circuit, citing four decades of New York district court opinions interpreting section 203(b)(5) of the New York Civil Practice Law and Rules, which affords an extra sixty days beyond the normal limitations period when a summons is delivered to a designated official within the normal limitations period and the summons is served within the sixty day period, held that diversity plaintiffs are entitled to the benefits of section 203(b)(5) and that the clerk of a district court may serve as the depository for a summons. (App. 12a-15a). The Court of Appeals further concluded that "[t]he same circumstances that sufficed to constitute a waiver of service for purposes of personal jurisdiction also waive

service for purposes of strict compliance with section 203(b)(5)." (App. 15a).

Petitioner filed a petition for rehearing and suggestion for a rehearing en banc, contending that the Court of Appeals improperly permitted amendment of the complaint contrary to the requirements of Rule 15(c) of the Federal Rules of Civil Procedure. On May 2, 1990, the Court of Appeals, per curiam, denied the petition for rehearing, and rejected petitioner's contention that the notice it received arrived beyond the relevant two year statute of limitations. The Court of Appeals, as it did in its original opinion, emphasized that there is "no dispute that Teledyne Industries, Inc. received notice within the 60-day extension period [provided by section 203(b)(5) of the New York Civil Practice Law & Rules]." (App. 2a). The Court of Appeals also rejected petitioner's claim that reliance on the sixty day tolling period to validate the notice is precluded by *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986). (App. 2a). The Second Circuit distinguished the present action from *Schiavone*, in part, by noting that "plaintiffs are not seeking to use Rule 4(j)'s 120-day time period for service to validate their Rule 15(c) notice to Teledyne Industries; they are relying on the 60-day extension period that New York adds to its own limitations period," (App. 3a), and held that "the notice here satisfies Rule 15(c), and the amendment will relate back to the date of the original complaint." (App. 3a). On May 24, 1990, the Second Circuit summarily denied petitioner's suggestion for a rehearing en banc, advising that none of the judges of the Second Circuit requested that a vote be taken on the suggestion for

rehearing en banc. The order is reprinted in the supplemental appendix attached to this brief. (Supp. App. 1a).

The Second Circuit issued a mandate relinquishing jurisdiction to the district court on June 8, 1990. Datskow and Grossair filed an amended complaint correcting the name of the defendant to "Teledyne Industries, Inc." on June 19, 1990.

REASONS FOR DENYING THE WRIT

INTRODUCTION

Petitioner's argument for granting the Writ can be categorized as follows:

First, petitioner argues that the Court of Appeals' decision, in its review of the district court's dismissal of the complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure, is at odds with recent opinions of the Court addressing the standard of review to be applied in connection with Rule 52(a) fact finding;

Second, petitioner argues that there is a conflict among the courts of appeals concerning the appropriate standard of review to be applied with respect to the waiver of an arbitration defense, which petitioner claims is analogous to the issue of the standard of review to be applied to the waiver of the defense of service of process;

Third, petitioner argues that the Court of Appeals' holding that petitioner waived its jurisdictional defense by virtue of its failure to alert the district court at a Rule 16 scheduling conference that the court lacked personal jurisdiction is so shocking as to constitute a departure

from the accepted and usual course of proceedings requiring the Court's intervention; and

Fourth, petitioner argues that the Court of Appeals did not apply the proper standard of review with respect to its review of the district court's refusal to allow respondents leave to amend the complaint to correct the identification of the defendant, and that its conclusion that the named defendant had actual notice of the lawsuit within the limitations period provided by the applicable state law is at odds with the Court's decision in *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986).

None of these arguments, nor the authority advanced by petitioner in support therefor, constitute the "special and important reasons" warranting review of this case. Sup. Ct. R. 10.1.

I. THE SECOND CIRCUIT'S DECISION THAT THERE WAS WAIVER OF THE DEFENSE OF INSUFFICIENT SERVICE OF PROCESS DOES NOT CONFLICT WITH ANY APPLICABLE DECISION OF THE COURT.

Petitioner inaccurately suggests that the decision of the Court of Appeals for the Second Circuit conflicts with the decisions of the Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), *Amadeo v. Zant*, 486 U.S. 214 (1988), and *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990). Petitioner also argues that these decisions recognize that the principles of appellate review embodied in Rule 52(a) apply to the review of the district court's determination concerning waiver of a Rule 12 defense, which should be

reviewed under a "deference standard." This argument does not merit review by the Court.

These three decisions are factually and legally distinguishable from the case at bar. First, none of the cases cited dealt with the standard of review of the Rule 12 dismissal of a lawsuit. For example, in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), a civil rights action, the district court, after hearing two days of testimony, issued a memorandum opinion setting forth its findings that the plaintiff was entitled to judgment because she had been denied a position on account of her sex, and asked the plaintiff's counsel to submit proposed findings of fact and conclusions of law expounding upon those set forth in the court's memorandum. Similarly, *Amadeo v. Zant*, 486 U.S. 214 (1988), also relied upon by petitioner, was a habeas corpus proceeding which also involved an evidentiary hearing by the district court. Finally, in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), the issue was the appropriate standard of review to be employed in determining the propriety of the district court's imposition of Rule 11 sanctions. The Court, looking at the language of Rule 11 and its policy goals, concluded that an abuse of discretion standard was appropriate in reviewing all aspects of a district court's imposition of Rule 11 sanctions. *Id.* at 2461.

Second, by its express terms, Rule 52(a) applies only to "actions tried upon the facts without a jury or with an advisory jury. . . ." Fed. R. Civ. P. 52(a). Indeed, Rule 52 findings of fact and conclusions of law are "unnecessary on decisions of motions decided under Rules 12 or 56," *id.*, although a district court may do so. The district court here, however, did not set forth Rule 52(a) findings of fact

and conclusions of law in either decision and order. (App. 32a-34a; 17a-31a).

More importantly, even if Rule 52(a) could be said to govern the scope of appellate review herein, there still is no need for review by the Court. The critical facts relating to service of process and to defense counsel's conduct at the scheduling conference were not in dispute. Moreover, the district court, which addressed the issue of waiver in a footnote, compared the six month gap between the commencement of the lawsuit in the present action and the filing of a motion to dismiss for improper service with the two year and three and one-half year delays, respectively, in *Vozech v. Good Samaritan Hospital*, 84 F.R.D. 143 (S.D.N.Y. 1979) and *Burton v. Northern Dutchess Hospital*, 106 F.R.D. 477 (S.D.N.Y. 1985), cases cited by respondents. (App. 18a). Thus, the district court's ruling that there was no waiver was a conclusion of law reached after review of other precedent and application of legal precepts in those cases to undisputed facts. The Court of Appeals did not disturb the factual elements of the district court's determination with respect to the defense of insufficient service of process, but corrected its erroneous legal conclusion that the defense had not been waived.

The Court has recognized that, although Rule 52(a) applies to findings of fact, "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, *reh'g denied*, 467 U.S. 1267 (1984) (citations omitted). Cf. *Cooter & Gell*, 110 S. Ct. at 2459 (fact-dependent

legal standard mandated by Rule 11 does not preclude court of appeals from correcting district court's legal errors). Consequently, even if the determination of waiver of a Rule 12 defense by conduct could be construed as involving a mixed question of law and fact, the Court of Appeals was empowered to correct the district court's errors of law, which is totally consistent with the Court's teachings.

In sum, the Court of Appeals correctly applied the precedents of the Court in its review of the district court's dismissal of the lawsuit.

II. THIS CASE DOES NOT INVOLVE AN ISSUE IN WHICH THERE HAS BEEN A CONFLICT AMONG THE COURTS OF APPEALS ON THE SAME MATTER.

Rule 10.1 of the Rules of the Supreme Court of the United States provides that the Court will consider exercising jurisdiction on writ of certiorari "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals *on the same matter*. . . ." S. Ct. R. 10.1(a) (emphasis added). Petitioner claims that there is a dispute among the circuits concerning the standard of review to be applied with respect to the waiver of the defense of arbitration, which petitioner argues is analogous to the issue of waiver in the present matter.

The waiver of an arbitration defense in civil litigation is a totally different issue from the questions presented in the case at bar. Any claimed conflict among the circuits concerning the proper standard of review for waiver of

arbitration notwithstanding, there is no dispute *on the same issue* warranting the Court's intervention. Furthermore, even if the issue of waiver of an arbitration defense is analogous to the issue of waiver presented here, the Second Circuit's decision did not substitute its marshalling of the facts for that of the district court, but simply corrected the lower court's error of law, which makes any such divergence among the circuits a nonissue.

Petitioner's attempt to shoestring an argument using cases dealing with unrelated matters is meritless and simply not applicable legally or factually to the present action.

III. THE COURT OF APPEALS' DETERMINATION THAT THERE WAS WAIVER OF A JURISDICTIONAL DEFENSE BY CONDUCT IS BY NO MEANS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS REQUIRING THE COURT'S REVIEW.

Petitioner argues next that the Court of Appeals' ruling that, by virtue of its conduct at the scheduling conference, Teledyne waived its right to complain about the technical defects in service constitutes a "startling" departure from the accepted and usual course of judicial proceedings, requiring the exercise of the Court's power of supervision. To the contrary, the Second Circuit was troubled by petitioner's conduct "under all the circumstances," including the fact that petitioner hid behind the "Teledyne" name, as well as the fact that defense counsel never apprised the magistrate at the Rule 16 pretrial conference that he claimed that the wrong party had been sued, that service of process was claimed to be defective,

or that, by virtue of the claimed defective service and failure to properly commence the action, the court lacked personal jurisdiction over Teledyne.

The Court has recognized that the defense of personal jurisdiction is a privileged defense which may be waived by virtue of a defendant's conduct. *See Neurbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). In consonance with this principle, Rule 12 allows a defendant the option of raising its defenses in its answer or in a pre-answer motion to dismiss. Fed. R. Civ. P. 12(b),(h)(1). Here, petitioner complied literally with Rule 12 by interposing these defenses in its answer. Nevertheless, the defense is not preserved in perpetuity but must be raised by motion. A respected commentator, examining Rule 12(g), which requires all Rule 12 defenses to be raised at one time in a single motion, has recognized that Rule 12 "contemplates the presentation of an omnibus pre-answer motion in which defendant advances every available Rule 12 defense and objection he may have that is assertable by motion. . . ." 5A C. Wright & A. Miller, *Federal Practice & Procedure Civil 2d* § 1384, at 726 (1990). The purpose of Rule 12 is to "eliminate unnecessary delay at the pleading stage." *Id.* (citations omitted).

Similarly, Rule 16, governing pretrial conferences, is intended to "expedit[e] the disposition of the action" and to "discourag[e] wasteful pretrial activities." Fed. R. Civ. P. 16(a)(1),(3). Defense counsel, by his silence, has prolonged the litigation and caused needless pretrial and appellate activities. The reason for counsel's silence at the conference, as well as the decision not to raise the defenses by pre-answer motion, is simple; had petitioner done so, the defects in service and in the naming of the

defendant could have been corrected and the action properly commenced before the expiration of the statute of limitations.

Petitioner does not claim that defense counsel did not know at the conference that defects in the pleadings or in service of process existed, nor does it claim that discovery was necessary to investigate whether to pursue these defenses by Rule 12 motion. Rather, petitioner contends that counsel had no obligation, as an officer of the court, to alert the magistrate to matters which would have changed the entire complexion of the pretrial conference. It is this position, and not the Second Circuit's refusal to reward petitioner for its lack of candor before the district court, that truly is startling. The zealous advocacy of a client does not permit an advocate to mislead a judicial body, by silence or otherwise.

As a zealous advocate, a lawyer has a duty not only to the client, but to the legal system, to represent his client "within the bounds of the law." Model Code of Professional Responsibility EC 7-1 (1970), *reprinted in* N.Y. Jud. Law App. (McKinney 1975). *See also* EC 7-19 (duty of a lawyer to his client and to the legal system are the same: "to represent his client zealously within the bounds of the law"). It is axiomatic that "[i]n order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently. . . ." EC 7-20.

Here, by virtue of defense counsel's silence, the district court was deprived of all of the facts necessary to administer justice promptly and efficiently. The issue is not whether counsel has a legal obligation to apprise an

adversary of a dispositive issue, as petitioner implies, but whether counsel has an obligation to the judicial process to alert a court of limited jurisdiction to a potential roadblock to its ability to exercise jurisdiction at all. Further, contrary to the assertions in petitioner's brief, there would have been no prejudice to petitioner had counsel been candid at the scheduling conference because Tele-dyne Industries, on whose behalf defense counsel appeared, not only does business in New York, but had actual notice of the lawsuit in the governing limitations period and was able to prepare and prosecute its defense. Rather, justice would have been done, and it was done when the Court of Appeals refused to allow petitioner to benefit from its silence and subterfuge. There is, accordingly, no need for the Court to exercise its supervisory powers in this instance.

IV. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW TO THE DISTRICT COURT'S REFUSAL TO ALLOW TO LEAVE TO AMEND UNDER RULE 15(c), AND ITS DECISION IS CONSISTENT WITH THE COURT'S DECISION IN *SCHIAVONE V. FORTUNE, AKA TIME, INC.*, 471 U.S. 21 (1986).

Petitioner's final argument concerns respondents' motion for leave to amend the complaint pursuant to Rule 15(c) of the Federal Rules of Civil Procedure. Petitioner claims that the Court of Appeals did not find abuse of discretion by the district court, and, further, that this decision is inconsistent with the Court's decision in *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986).

It is undisputed that the appropriate standard of review of the district court's refusal to allow leave to amend is abuse of discretion.³ Though the Second Circuit did not expressly find that the district court's refusal to permit leave to amend was an abuse of its discretion, a finding of abuse of discretion is implicit in the Second Circuit's holding that the proper defendant had actual notice of the lawsuit within the applicable statute of limitations, the prerequisite for leave to amend under Rule 15(c).

The Second Circuit's finding of relation back easily is reconciled with *Schiavone*, where the Court rejected the concept of notice received after the expiration of the statute of limitations but received within the 120 day period for service of process provided by Rule 4(j). 477 U.S. at 30. As the Second Circuit recognized, respondents' Rule 15(c) notice to Teledyne Industries was validated not by Rule 4(j) but by the sixty day extension period New York adds to its own limitations period. (App. 3a). Section 203(b)(5) is not, as the petitioner repeatedly and incorrectly suggests, a service of process provision, but a statutory extension of time in which to *commence* an action by service of the summons. N.Y. Civ. Prac. Law & R. §§ 203(b)(5), 304 (McKinney 1990). In any event, the three year statute of limitations for the survival action and property damage action did not run until November

³ Respondents apprised the Court of Appeals in their brief that the standard of review with respect to the lower court's refusal to grant the motion for leave to amend is abuse of discretion. Teledyne, on the other hand, did not advise the Court of Appeals of the appropriate standard of review for this or any other issue.

26, 1989, and Teledyne Industries most certainly had actual notice of the lawsuit within this limitations period.

Not only was the Second Circuit's decision consistent with the teachings of *Schiavone*, but in view of the proposed amendments to Rule 15(c), which will overturn *Schiavone* by recognizing a federal 120 day service period extending the limitation period for purposes of providing Rule 15(c) notice, in addition to state notice provisions, see Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and Federal Rules of Civil Procedure, Proposed Rule 15(c)(1),(3), 127 F.R.D. 237, 309-12 (1989), there is no compelling reason for the Court to address the Rule 15(c) issue here.

This argument is yet another attempt to circumvent the holding of the Court of Appeals, and to prolong this already protracted litigation. Without complaint or rancor, respondents respectfully state that review by the Court is unwarranted and the Court should decline to exercise its certiorari jurisdiction.

CONCLUSION

For the reasons set forth above, respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: August 31, 1990

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24 day of May, one thousand nine hundred and ninety

MARJORIE DATSKOW, Executrix
of the Estates of Robert C. Gross
and Susan C. Gross, Deceased and
Administratrix of the Estates of
Michael and David Gross, Deceased
and GROSSAIR, INC.,

Plaintiff-Appellants,

v

TELEDYNE, INC., Continental
Products Division,
Defendant-Appellee.

DOCKET
NUMBER

89-7916

(FILED
MAY 24 1990)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellee, Teledyne Inc.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

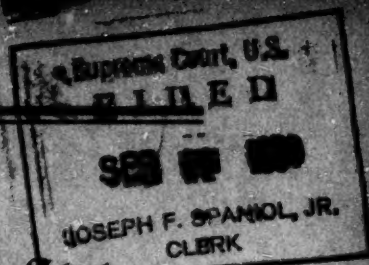
It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

by /s/ Tina Eve Brier
Chief Deputy Clerk



3
No. 90-199



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

TELEDYNE, INC.,

Petitioner,

—v.—

MARJORIE DATSKOW, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF PETITIONER IN REPLY TO
BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF PETITIONER IN REPLY TO
BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Petitioner Teledyne, Inc. hereby replies to the brief of respondents in opposition to the petition for a writ of certiorari.

ARGUMENT

I

On the issue of standard of review, both sides agree there is no dispute about what happened: respondents attempted extraterritorial service by mail upon the named defendant, Teledyne, Inc.; Teledyne, Inc.¹ timely raised the defense

¹ On pages 4 and 18 of their brief, respondents suggest that a generic all-encompassing "Teledyne" answered the complaint, and that counsel who appeared at the scheduling conference was appearing on behalf

of invalid service in its answer to the complaint; and three weeks later, at a scheduling conference, counsel for Teledyne, Inc. was silent about its defense of invalid service and did not raise it again until its motion to dismiss, timely filed in accordance with the magistrate's scheduling order.

Respondents argue that since the District Court's determination on waiver was based upon undisputed facts, this ruling became a "legal" conclusion which the Second Circuit could "correct" without deference to the District Court. Waiver of a defense timely interposed, however, is precisely the kind of fact-specific question the Court has stated, time and time again, must be reviewed by appeals courts under a deferential standard, even when the facts relating to the pre-trial conduct are not in dispute or are contained in documents. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990); *Pierce v. Underwood*, 487 U.S. 552 (1988); *Amadeo v. Zant*, 486 U.S. 214 (1988); *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Contrary to respondents' argument, the Court's line of decisions culminating last term in *Cooter & Gell* does not depend on evidentiary hearings nor the express application of Rule 52 of the Federal Rules of Civil Procedure.² *Pierce v. Underwood*, 487 U.S. 552 (1988), which respondents have not addressed, as well as *Cooter & Gell*, involved neither evidentiary hearings nor Rule 52 findings of fact. The Court in each case held that a deferential standard of review is to be applied to a district court's determination regarding pretrial conduct. As noted by the Court in *Pierce*, questions involving

of Teledyne Industries, Inc. This is incorrect. As the District Court found, it was Teledyne, Inc. which was named in the complaint, timely answered and raised the defense of invalid service, and, by its counsel, appeared at the scheduling conference. (20a & n.3).

2 Respondents' suggestion notwithstanding, petitioner nowhere argued that Rule 52 expressly applies to a Rule 12 determination. Petitioner argued only that, under the Court's decisions the principles of Rule 52 are equally applicable to the review of all "fact-specific" district court determinations.

“ ‘supervision of litigation,’ ” as here, have long been given “abuse-of-discretion review.” 487 U.S. at 558 n.1 (citing cases and other examples of pretrial determinations).

In the case at bar, the Second Circuit did not review under an abuse-of-discretion/deferential standard the following pretrial findings which related to the issue of waiver:

1. While the District Court found that respondents were not misled by Teledyne, Inc.’s use of the name “Teledyne” in a number of its subsidiary companies (App. 20a n.3),³ the Court of Appeals found respondents were misled (App. 9a-10a);

2. Although the District Court found Teledyne, Inc. and Teledyne Industries, Inc. are separate legal entities (App. 22a & n.4), the Court of Appeals treated them as interchangeable, and in fact held that Teledyne, Inc., by the action of its counsel, waived the defense even as to Teledyne Industries, Inc., an entity which was not named and did not appear as a party (App. 12a);

3. While the District Court found that respondents sued and intended to sue Teledyne, Inc. (App. 20a & n.3, 33a), the Court of Appeals found that respondents sued and intended to sue Teledyne Industries, Inc. (App. 9a);

4. Whereas the District Court found in effect that respondents were not prejudiced by conduct of petitioner but by their own mistakes and their decision to commence the action “with only four days remaining on the limitations ‘clock’ ” (App. 30a), the Court of Appeals implicitly found that respondents were prejudiced (App. 12a).

Based upon these findings and others which were not in dispute, the District Court rejected as “wholly without merit” the notion that petitioner somehow “waived” its

3 The “App.” references used in this reply brief refer to the appendix to the petition for a writ of certiorari.

jurisdictional defenses. (App. 18a n.1). The Second Circuit, upon a cold record, found to the contrary. This was not a correction of a "legal error," as respondents argue, and the Second Circuit did not point to any "legal error." See App. 12a.

Respondents misunderstand that the conclusion whether a pleaded defense has been waived is not a question of law, but a mixed question of law and fact. Rule 12, as the Court explained in *Cooter & Gell* with reference to Rule 11, "requires a court to consider issues rooted in factual determinations." 110 S. Ct. at 2459. "Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply [a] fact-dependent legal standard. . . ." *Id.* at 2459. Where, as here, "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 2458 (quoting *Anderson v. Bessemer City*, 470 U.S. at 573-574).

The Court of Appeals did not, and indeed could not, find an abuse of discretion in the District Court's determination that waiver on these facts is "wholly without merit."⁴ Giving no deference to the factual findings of the District Court and the District Court's determination that there was no waiver, the Second Circuit substituted its own factual findings, and its discretion "under all the circumstances," for the findings and determination of the District Court.

The Second Circuit's decision is clearly wrong and is squarely in conflict with the decisions of the Court.

4 Contrary to respondents' statement that Teledyne, Inc. did not advise the Court of Appeals of the appropriate standard of review (Respondents' Brief, at 19 n.3), Teledyne, Inc. argued the appropriate standard in its Petition for Rehearing and Suggestion for Rehearing In Banc, at 2, 3, 4, 9, 14. Respondents were the appellants before the Second Circuit and when the Second Circuit substituted its determination on waiver for that of the District Court, petitioner argued for the appropriate standard in its petition for rehearing.

II

Respondents argue there is no conflict among the circuits on the issue of waiver because the cases petitioner cites dealt with the waiver of a different defense, the defense of arbitration.

The legal issue before the Court for review, however, is the standard of review of a determination by a district court on whether a defendant, by its conduct, waived a timely interposed defense in its answer. On that issue, it is inconsequential what particular defense is the subject of waiver, whether the defense of invalid service or the defense of arbitration. The factual elements and legal standard for waiver of any pleaded defense are generally the same. The issue in this case is the standard of review of pretrial determinations on whether a pleaded defense has been waived. This is the conflict among the circuits which has manifested itself in decisions involving the defense of arbitration.

III

Respondents argue that the Second Circuit correctly found waiver because of counsel's silence at the scheduling conference. Respondents' argument is that the ethical duty of Teledyne, Inc.'s counsel to represent his client zealously and protect his client's interests and defenses is subordinate to counsel's duty to advise the court about defects in jurisdiction so that the court or respondents could timely correct them.

The respondents do not dispute what occurred at the conference before the magistrate three weeks after Teledyne, Inc. timely pleaded its defense of invalid service. Respondents' accusations that petitioner "mis[led] a judicial body," "lack[ed] candor," engaged in "subterfuge" do not change what occurred. At the conference, Teledyne, Inc.'s counsel was silent on the issue of invalid service while the magistrate

and the parties discussed a schedule for motions, including Rule 12 motions.

Respondents offer no refutation of petitioner's point that the Second Circuit's decision, in effect, requires petitioner's counsel to commit an ethical violation. The Second Circuit's decision holds that petitioner's counsel should have gratuitously advised his adversary at the conference of the defective service by mail, against his own client's interests and in breach of his ethical duty to represent his client zealously within the bounds of the law. Counsel adhered to the Rules precisely, and did not mislead the court in any way by action, representation or silence. Indeed, respondents concede that petitioner complied with Rule 12 by interposing its defense by answer rather than by pre-answer motion.⁵ (Respondents' Brief, at 16).

Respondents' only argument in opposition is that, balanced against a lawyer's duty to represent his client zealously, is a duty to inform the court of defects in its jurisdiction, referring primarily to the general principle stated in Ethical Canon 7-20: "In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently according to procedures that command public confidence and respect." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-20 (1970), *reprinted in* N.Y. Jud. Law app. (McKinney 1975). There is no legal support for such a position, either in judi-

5 Respondents nevertheless imply that petitioner should have made a pre-answer motion, relying on an out-of-context quote that Rule 12 "contemplates the presentation of an omnibus pre-answer motion" 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1384, at 726 (2d ed. 1990). Immediately preceding this quote is the following: "Rule 12 is designed to protect parties from the unintended waiver of any legitimate defense or objection. Indeed, the only persons to whom Rule 12(g) presents a hazard are motion-minded lawyers who . . . make numerous motions." *Id.* at 725-726.

Neither Rule 12(g), nor Rule 16, also mischaracterized by respondents, in any way removes the option provided by Rule 12(b) and (h) of raising defenses either by responsive pleading or motion, which petitioner properly exercised in this case.

cial decisions or in ethics rules, commentaries, or opinions. Respondents cannot and do not cite a single statute, rule, or decision which petitioner's counsel violated in fulfilling his ethical duty to his client.

In respondents' view, the petitioner was obligated to advise the court about respondents' mistaken service so respondents could correct it. In petitioner's view, petitioner's counsel was ethically bound *not* to alert his adversary.

The decision of the Second Circuit is indefensible. The decision heralds a rule of law which subverts a fundamental ethical duty an attorney owes his client, and the adversary system itself.

IV

Respondents argue that since the Judicial Conference has proposed amendments to Rule 15(c) which would in effect "overrule" *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986), the issue which petitioner brings to the Court for review will be academic. Unlike a question resolved by an intervening change in statute, however, the "overruling" of *Schiavone* by the proposed amendments to the Rules is a decision which the Court itself must make under the Rules Enabling Act, 28 U.S.C. §§ 2072-2074 (1988).

It is the Court which, one way or the other, must review the decision in *Schiavone* as it applies to cases, such as the case at bar, and consider the wisdom of the proposed amendments or modifications the Court may wish to make to those amendments.⁶ This case is a microcosm of the issues involved in Rule 15(c) relation back:

1. Can a party (Teledyne Industries, Inc.) be added to the litigation by "notice" under Rule 15(c), when the court had not obtained jurisdiction over the original defendant?

6 The Judicial Conference is scheduled to meet on September 12, 1990 and formally report the proposed amendments to the Court.

2. Do state tolling provisions for effecting service constitute an extension of the applicable limitations period within the meaning of Rule 15(c) as defined in *Schiavone*?

3. If the statute is "tolled" against the named defendant (Teledyne, Inc.), but not as against the party to be brought in (Teledyne Industries, Inc.), does Rule 15(c) permit "tolling" as against the party to be brought in, for purposes of determining whether "notice" was timely?

With respect to the first issue, respondents argue that timely Rule 15(c) "notice" was given to Teledyne Industries, Inc., within the 60-day extension provided by N.Y. CIV. PRAC. L. & R. § 203(b)(5) (McKinney Supp. 1990) to the 2-year limitations period for wrongful death. The argument disregards the fact, as the District Court found, that no action remained to "relate back to" because the named defendant, Teledyne, Inc. had not been properly served, and was not subject to the general or specific jurisdiction of the court. (App. 26a, 33a).

The second issue was specifically raised by the dissenting justices in *Schiavone*. 477 U.S. at 37 n.4 (Stevens, J., dissenting). The Court in *Schiavone* adopted "the literal meaning of the significant phrase in Rule 15(c)" as referring, without any qualification, to "the limitations period," *id.* at 31, notwithstanding the dissenting justices' argument that "such a literal interpretation is unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run." *Id.* at 37 n.4. The Second Circuit's decision which follows the views of the dissenting justices directly conflicts with the Court's interpretation of Rule 15(c) given in *Schiavone*.

The third issue, petitioner submits, depends on whether a so-called "identity-of-interest," a principle also raised in *Schiavone* but not decided, *id.* at 28-29, exists between the named defendant and the party to be brought in. In this case

as noted above, the District Court found as a factual matter that no such identity existed, whereas the Second Circuit implicitly found an "identity-of-interest" by treating Teledyne, Inc. and Teledyne Industries, Inc. interchangeably. As respondents concede, Rule 15(c) determinations are subject to a deferential/abuse-of-discretion standard of review, and this subsidiary factual finding, which the Second Circuit should not have ignored, further precluded relation back in this case.

CONCLUSION

For the reasons set forth above, and in the petition, petitioner urges that the petition for a writ of certiorari be granted.

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